SUPREME COURT OF THE UNITED STATES

October Term, 1941

No.....

ADRIANO MERLANO BERSIA, CARLO NOVELLA, ERNESTO VIANI, GIUSEPPE PRATALONGO, GIUSEPPE CARTA, ERNESTO BENEDETTI, SEVERINO ENRICO alias ENRICO SEVERINO, PLACIDO FRISONE, GIUSEPPE SICCARDI and ANGELO NAPOLI,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

A.

Introductory Statements.

1.

Report of Opinion Below.

The opinion of the Circuit Court of Appeals is reported in 124 F. (2d) 310. No opinion was rendered by it in denying the petition for a rehearing. No opinion was rendered in the District Court.

2.

Jurisdiction.

The judgment of the Circuit Court of Appeals denying the petition for a rehearing was entered on the 31st day of January, 1942.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended in the Act of February 13th, 1925, (43 Stat. 938; 28 U. S. C. A., sec. 347).

3.

Specifications of Error.

The specifications of error are set out in the Petition *supra* (3-5).

B.

Argument.

Summary of Argument.

The statute whereunder the indictment was laid, Act of Congress of June 15, 1917, c. 30, Title III, 40 Stat. 221, (18 U. S. C. A., sec. 502), was without application to the persons or to the ship or to the intent or state of mind involved.

First, as to the persons. The statute creates an offense consisting in the wrongful attack upon vessel property, a kind of offense long known to the common-law, and, like all other statutes making criminal the wrongful destruction or attempted destruction of property or other offense against the same, requires to be construed in the light of the common-law principles applicable to such common-law offense. One of these principles, invariably applied at common law, was that an owner's damage or destruction of his own property, or other dealing therewith, attempted or accomplished, was not embraced within the offense, and constituted an implied exception to statutes declaring the common-law offense or extending it to new classes of property or offenses against the same.

The statute, too, was limited by its own express terms to trespassers, inasmuch as it employed the term "tamper", to define the crime for which these petitioners were indicted, tried and convicted; and that term, according to its ordinary, every-day meaning and acceptation, refers to intrusion into or upon the concerns of *others,* not one's *own.*

The statute, too, must be read in the light of, and, if reasonably possible, reconciled with, other sections of the same statute and other statutes *in pari materia*. Unless construed as applicable only to trespassers, it usurps the functions of, and conflicts with, other sections of the statute and other statutes, notably Title II, sec. 3, of the same Act and the Act of June 7th, 1872, c. 322, sec. 51, 17 Stat. 273-274, as amended, (46 U. S. C. A., sec. 701, subd. 7).

Not only was no proof or claim advanced below by the respondent to the effect that appellants were not duly authorized by the vessel's owner to do what they did, but the proofs showed the contrary to be true.

Secondly, as to ships. The statute, here invoked by respondent, applies, according to its own terms, its title, its historical background and its requisite correlation with other statutes *in pari materia*, notably Titles II and IV of the same Act, only to ships engaged in foreign commerce. The Villarperosa was not.

Thirdly, as to intents or states of mind. The statute, to avoid unpermissibly absurd results, because of the nature and gravity of the penalty provided for its infraction and because of the surrounding and similar sections of the same statute, as well as the history of the legislation, must be read (as the Grand Jurors did read it) as requiring, for the consummation of the crime therein denounced, a guilty mind or criminal intent; an intent to perpetrate a legal wrong. And the statute expressly requires an intent to injure or endanger the vessel's safety. Not only was there no proof of either such intent, but the proofs were positive in disproving such.

For the foregoing reasons, the indictment was insufficient in not negativing the right of the appellants, as possessor-owners of the property involved or the duly authorized agents of such, to do what they did, and in invoking a statute that, as construed below, could have no constitutional application, because of its serious and arbitrary

infringement of the rights of property without reasonably tending thereby to achieve the ends aimed at by the legislation.

And for the same reasons the evidence did not warrant the submission of the case to the Jury.

POINT I.

The statute invoked was without application to the case presented.

The question of the application of the statute (Act of June 15, 1917, c. 30, Title III, 40 Stat. 221, 18 U. S. C. A., sec. 502)* is three-fold, viz.: (1) To what persons was it meant to be applied? (2) To what ships? (3) To what intents or states of mind?

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*That the statute may be considered in its original setting, there is here reproduced the chapter heading and Titles II, III and IV of the Act, as contained in the Statutes at Large (40 Stat. 217, 220, 221):

"Chap. 30—An Act To punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes.

* * * * *

TITLE II.

VESSELS IN PORTS OF THE UNITED STATES.

"SECTION 1. Whenever the President by proclamation or Executive order declares a national emergency to exist by reason of actual or threatened war, insurrection, or invasion, or disturbance or threatened disturbance of the international relations of the United States, the Secretary of the Treasury may make, subject to the approval of the President, rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, may inspect such vessel at any time, place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of the rights and obligations of the United States, may take, by

The Courts below answered these questions as follows:

They held the statute, because of the use of the inclusive term "whoever", to apply to everybody.

They held the statute to apply to all ships of foreign registry, whether engaged in foreign commerce or indefinitely laid up in ports of the United States. And the Circuit Court held the Villarperosa, as a matter of law, to have been engaged in foreign commerce.

And, as to criminal intent or legal malice, the Courts held there need be none, so long as there was an intent to injure or endanger the vessel's safety. And the Court of Appeals, contrary to the trial court, held that even as to the latter intent, it was sufficient to violate the statute if it was merely an intent to injure the ship so as to pre-

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and with the consent of the President, for such purposes, full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by him to go or remain on board thereof.

"Within the territory and waters of the Canal Zone the Governor of the Panama Canal, with the approval of the President, shall exercise all the powers conferred by this section on the Secretary of the Treasury.

"SEC. 2. If any owner, agent, master, officer, or person in charge, or any member of the crew of any such vessel fails to comply with any regulation or rule issued or order given by the Secretary of the Treasury or the Governor of the Panama Canal under the provisions of this title, or obstructs or interferes with the exercise of any power conferred by this title, the vessel, together with her tackle, apparel, furniture and equipment, shall be subject to seizure and forfeiture to the United States in the same manner as merchandise is forfeited for violation of the customs revenue laws; and the person guilty of such failure, obstruction, or interference shall be fined not more than $10,000, or imprisoned not more than two years, or both.

"SEC. 3. It shall be unlawful for the owner or master or any other person in charge or command of any private vessel, foreign or domestic, or for any member of the crew or other person, within the territorial waters of the United States, willfully to cause or permit the destruction or injury of such vessel

vent her operation, regardless of any intent to imperil her safety.

It was the appellants' contention, however, that the statute, like the Sabotage Act, enacted at the same session of Congress, (*infra*, 37-41), applied only to trespassers; that it applied only to ships engaged in foreign commerce; and that it applied to such persons and such ships only if the prohibited acts were accompanied, both by a criminal intent *and* an intent to injure the safety or endanger the safety of the ship.

A.

The statute applies only to trespassers; not to vessel-owners or their authorized agents, the officers and crew.

This must be true, appellants urge, under fundamental rules of statutory construction.

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or knowingly to permit said vessel to be used as a place of resort for any person conspiring with another or preparing to commit any offense against the United States, or in violation of the treaties of the United States or of the obligations of the United States under the law of nations, or to defraud the United States, or knowingly to permit such vessel to be used in violation of the rights and obligations of the United States under the law of nations; and in case such vessel shall be so used, with the knowledge of the owner or master or other person in charge or command thereof, the vessel, togther with her tackle, apparel, furniture, and equipment, shall be subject to seizure and forfeiture to the United States in the same manner as merchandise is forfeited for violation of the customs revenue laws; and whoever violates this section shall be fined not more than $10,000 or imprisoned not more than two years, or both.

"SEC. 4. The President may employ such part of the land or naval forces of the United States as he may deem necessary to carry out the purpose of this title.

TITLE III.

INJURING VESSELS ENGAGED IN FOREIGN COMMERCE.

"SECTION 1. Whoever shall set fire to any vessel of foreign registry, or any vessel of American registry entitled to engage in commerce with foreign nations, or to any vessel of the United States as defined in section three hundred and ten of the Act

1.

The general terms of the statute must be construed in the light of those common-law principles applied to similar offenses at the common law.

The general rule of statutory construction, thus invoked, is, as stated by this Court:

> "Where the expression is in general terms, statutes are to receive such a construction as may be *agreeable to the rules of the common law* in cases *of that nature*, for statutes are not presumed to make any alteration in the common law, beyond what is expressed in the statute." (Emphasis supplied.)
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> *Ross* v. *Jones*, 22 Wall. 576.

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of March fourth, nineteen hundred and nine, entitled 'An Act to codify, revise, and amend the penal laws of the United States,' or to the cargo of the same, or shall tamper with the motive power or instrumentalities of navigation of such vessel, or shall place bombs or explosives in or upon such vessel, or shall do any other act to or upon such vessel while within the jurisdiction of the United States, or, if such vessel is of American registry, while she is on the high sea, with intent to injure or endanger the safety of the vessel or of her cargo, or of persons on board, whether the injury or danger is so intended to take place within the jurisdiction of the United States, or after the vessel shall have departed therefrom; or whoever shall attempt or conspire to do any such acts with such intent, shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

TITLE IV.

INTERFERENCE WITH FOREIGN COMMERCE BY VIOLENT MEANS.

"SECTION 1. Whoever, with intent to prevent, interfere with, or obstruct or attempt to prevent, interfere with, or obstruct the exportation to foreign countries of articles from the United States shall injure or destroy, by fire or explosives, such articles or the places where they may be while in such foreign commerce, shall be fined not more than $10,000, or imprisoned not more than ten years, or both."

In course of interpreting a Federal statute, this Court said that

> "statutes, in subordination to their terms, are to be construed agreeably to the rules of the common law." (Citing Bacon's Abridgment, tit. Statute 1, 4.)
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> *United States* v. *Thomas*, 82 U. S. (15 Wall.) 337, 345.

Accordingly, a crime created by a Federal statute, even though the latter do not expressly include a *scienter* as an element, will nevertheless be deemed to require the same as one of its essential ingredients, if, in the treatment of *similar* common-law offenses, the common law regarded *scienter* as a necessary constituent thereof. (*United States* v. *Carll*, 105 U. S. 611.)

A Federal statute making criminal the conversion of funds of a given character will be interpreted as requiring the presence of a "guilty mind", in deference to the rule

> "that where an act is made a crime by statute, the statute is to be construed in the light of the common law * * *." (*Masters* v. *United States*, 42 App. D. C. 350.)

And, to cite a very closely parallel case, where a Federal criminal statute, like the one before us, made it a crime *inter alia* to "set fire", or attempt to destroy by "explosive", certain specified property, and expressly provided that "whoever" did so, should be punishable with imprisonment up to twenty years, it was ruled that "whoever" should be construed as impliedly excepting the possessor-owner of the property, since the common law always did so in disposing of *similar* offenses. (*United States* v. *Cardish* [E. D. Wis.], 145 Fed. 242, 248.)

The rule is one of general application. (*Moore* v. *United States*, 91 U. S. 270; *Michigan Central R. R.* v. *Vreeland*, 227 U. S. 59; *Schreiber* v. *Sharpless*, 110 U. S. 76.)

And, as the cases cited *supra* show, it is not confined to being exercised within the narrow limits of defining the elements of a statutory crime merely when Congress has referred to the crime by its common-law name, without more. That is but one instance of the general application of the rule. As Judge Shiras said (*Murray* v. *Chicago & N. W. Ry. Co.*, 62 Fed. 24, aff'd 92 Fed. 868 [C. C. A., 8th Cir.]) (31):

> "to a large extent, the legislative and judicial action of the government would be without support and without meaning if they cannot be interpreted in the light of the common law."

And (32):

> "the courts are bound by the general principles of the common law, save where the same have been changed by legislative enactment."

In speaking of the application of this rule, particularly in the criminal field, 1 Bishop's Criminal Law (9th Ed.), 195, says, a

> "new statutory rule is to be limited, extended and governed by the same common-law principles, and to the same extent, as were the common-law rules themselves before the statute was passed. For example, a common-law offense was not committed when the forbidden act was done by a child under seven years old, or by an insane person or by a sane person through compulsion or through an innocent mistake of facts; therefore, a statutory offense, *however general and broad the inhibition*, should *not* be held to have been committed *under the like circumstances*. Such is the *reason* of the law, and so likewise are *mainly* our decisions. But occasionally a court, utterly oblivious of the nature of the law or of the law's reasons, pronounces that where the statute has

made no exception the court can make none." (Emphasis supplied.)

And Wharton's Criminal Law, Vol. 1, p. 385 (12th ed.), speaking of statutory offenses against the United States, says that

> "there is not one of these offenses whose character is not, according to the construction given by the Federal courts, determined by a resort to the common law."

In rejecting a contention that corporations should be excepted from the incidence of such a rule, this Court said:

> "Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted, in every other case, civil *and criminal,* its rules for the construction of statutes; is there any thing in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? * * * Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle; and for introducing a new and adverse rule of construction in favour of corporations, while we adopt and adhere to the rules of construction known to the English common law, *in every other case, without exception?*" (Emphasis supplied.)
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> Ch. J. Taney in *Charles River Bridge* v. *Warren Bridge,* 36 U. S. 420, 545.

a.

In the case of offenses at common law similar to that denounced by the statute here under consideration, the possessor-owners of the property, injured or destroyed, were invariably excepted from liability for such injury or destruction.

Any mere destruction of property at common law, that amounted to a crime, fell in the category of either arson or malicious mischief. Apart from the burning of dwelling houses (arson), any destruction of property with the requisite degree of malice constituted malicious mischief; and, if that necessary degree of malice was wanting, redress could be had only for the trespass in a private action.

> "Malicious *mischief*, or damage, is the next species of injury to private property, which the law considers as a public crime. That is such as is done not *animo furandi* or with an intent of gain by another's loss, which is some, though a weak excuse; but either out of a spirit of wanton cruelty, or black and diabolical revenge. In which it bears a near relation to the crime of arson; for, as that affects the habitation, so this does the other property of individuals."
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> 4 Bl. Comm. (Cooley's ed.) 243.

The leading case in this country, in defining the characteristics of the common-law crime of malicious destruction of property, is, according to the late Chief Justice Cooley (*id.* 243, note), *State* v. *Robinson*, 3 Dev. & Bat. 130, where the Supreme Court of North Carolina, presided over at the time by the late Mr. Chief Justice Ruffin, after reviewing the authorities, said (131):

> *"We extract from the adjudged cases as a rule of decision, that malicious mischief to be indictable, consists in the wilful destruction of some article of personal property, from actual ill-will or resentment*

> *towards its owner or possessor. State* v. *Landreth,* 2 Law Rep. 446—*State* v. *Simpson,* 2 Hawks 460." (Emphasis supplied.)

In line with that decision, it was held in *Loomis* v. *Edgerton,* 19 Wend. 419, that to destroy a ship "wilfully, wickedly, maliciously, and in a secret manner" constituted a crime at common law.

And that the destruction of ships, by burning or otherwise, was at common law regarded as a form of malicious mischief may be seen also in 1 Hawkins' Plea of the Crown, c. 24, in which the subject of ship-destruction is treated under the title of "Malicious, Wanton and Fraudulent Mischief".

And in 2 East's Pleas of the Crown, c. 22, the burning or other destruction of private ships constitutes the 21st section of his chapter on "Malicious or Fraudulent Mischief", as to which he states, arson "constitutes one of the most prominent of the class".

No offense against property, known to the common law, could be committed by its owner. Thus one could not be guilty of the larceny of one's own goods (*Regina* v. *Ward,* 7 Cox 421; *Rex* v. *Knight,* [1908], 1 Cr. App. Rep. 186, C. C. A.; *United States* v. *Cohen* [C. C. A. 3rd Cir.], 274 Fed. 596). A man could not be guilty of burglarizing his own house (*Rex* v. *White,* 1 Leach 252). Nor could he be guilty of robbery as to his own property (3 Greenleaf on Evidence [16th ed.] 217). Nor was it a crime for a man to burn his own house at common law (*Holmes' Case* [1634], Cro. Car. 376; *Bloss* v. *Tobey,* 2 Pick. [Mass.] 320, 324).

In *Holmes' Case, supra,* where the possessor-owner of a house was tried for burning it, it was said:

> "that it was not felony to burn a house whereof he is in possession by virtue of a lease for years; for they said that burning of houses is not felony unless

> that they are *aedes alienae*: and therefore Britton, Bracton, and The Book Assize mention, that it is felony to burn the house of another; and 10 Edw. 4, pl. 14, 3 Hen. 7, pl. 10, 10 Hen. 7, pl. 1, and Poulter's case, which say that burning of houses generally is felony, are to be intended *de aedibus alienis, et non propriis*: * * *"

And no man, at common law, could be charged with an offense against the state for destroying, *in whatever manner he might,* his *own* property (1 Bishop's Criminal Law [9th ed.] 377; 2 East P. C. 1072; *The State* v. *Mason,* 13 Ire. 341; *Commonwealth* v. *Shaffer,* 32 Pa. Superior Ct. 375, 379).

Bishop's explanation of the reason for the rule of the common law, that found no public offense in a man's destruction of his own property, is that it "promotes public wealth by stimulating private industry" (Bishop's Criminal Law [9th ed.], 377).

But, whatever the reason, the fact is plain. At common law, in every offense against property, it had to be charged and established, before any conviction could be obtained, that the property injured or destroyed belonged to someone other than the defendant.

b.

Statutes making criminal, offenses against specified property, no matter how general their terms, are, in keeping with the common-law rule, ever deemed impliedly to except, from their prohibitions, the owners of such property, unless expressly and affirmatively included.

So has been construed a Federal statute akin to this, making criminal the destruction, actual or attempted, of specified property by fire or explosion, and found in the same title of the United States Code as that here involved.

The statute (18 U. S. C. A., sec. 464) reads:

> "*Whoever* shall willfully and maliciously *set fire to,* burn, or attempt to burn, or by means of a *dangerous explosive* destroy or attempt to destroy, any dwelling house, or any store, barn, stable, or other building, parcel of a dwelling house, shall be imprisoned not more than twenty years." (Emphasis supplied.)

And that statute, be it noted, nowhere used any technical common-law term or word of art, such as "arson."

Its enforcement required no dictionary of the common law to define the meaning of a term peculiar to that jurisprudence. Like the statute in the case at bar, it merely denounced the setting of fire, the planting of explosives, etc.

Yet, in construing and applying that statute in *U. S.* v. *Cardish,* 145 Fed. 242, (E. D. Wis.), Judge Quarles, nonetheless, interpreted it in the light of the principles of the common law and, after referring to the common-law rule that requires the ownership of the property to be laid in the indictment, said (248):

> "At the bottom of this rule lies the simple proposition that at the common law a man was not guilty of arson who burned his own house while he occupied the same. *The indictment, therefore, must in some way negative that proposition,* not by any prescribed formula of words, but *sufficiently to show that the building burned was not that of the defendants."* (Emphasis supplied.)

And so it was held in *Rex* v. *Spaulding* (1780), 1 Leach, 218, where the language of the statute was couched in the most general terms, and the defendant was in possession of a copyhold on which he not only carried insurance but also had placed a mortgage. Lord Mansfield, construing

the same statute (9 Geo. I, c. 22), held to the same effect in *Rex* v. *Pedley* (1782), 1 Leach 242. And in *Rex* v. *Breeme* (1780), 1 Leach, 220, the nine Judges of England that heard the case, in passing upon the question whether the all-embracing terms "any person or persons" of the said statute (9 Geo. I, c. 22) included the occupant, held that they did not, and ruled that the old common-law rule established in *Holmes'* case, *supra,* (1634), Cro. Car. 376, still prevailed, even under the most general wording of the statute.

This rule of statutory construction is not confined to the particular type of statutory offenses created by the statute here under consideration, viz., setting fire, planting explosives and the like, but extends as well *throughout the entire range of statutory offenses against property.*

A case, well illustrative of this fact, is one of Chief Justice Ruffin's, viz., *State* v. *Mason,* 13 Ire. 341, which involved an indictment for defacing and injuring the dwelling house of one Hearnes, contrary to the statute. The statute (c. 70, Laws of N. C., 1846-47), couched in the most general terms, read as follows:

> "An act to protect Houses and inclosures from wilful injury.
>
> "Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same, That if any person or persons shall unlawfully and wilfully burn any uninhabited house, outhouse or other building, or shall unlawfully and wilfully demolish, pull down, deface, of by other ways or means destroy, injure or damage any dwelling house, or any uninhabited house, outhouse, or other building, * * * he, she, or they shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by fine or imprisonment, or both, at the discretion of the court in which such conviction shall be had."

The proofs showed that defendant had, at the instance of the lessee, when the latter's lease was about to expire, assisted him in taking up the flooring plank preparatory to carrying it away; and that the defendant, in doing so, knew that the lessee was merely the tenant of the property and that it was owned by Hearnes. On those facts the defendant moved for an instruction of "not guilty." The motion was denied, the case was submitted to the jury and the defendant was found guilty and sentenced. But on appeal that judgment was reversed. Chief Justice Ruffin, in delivering the Supreme Court's opinion of reversal, said:

> "In indictments *for injuries to property,* it is necessary *to lay the property truly,* and a variance in that respect is fatal." (Emphasis supplied.)

Continuing, the learned Chief Justice pointed out that the statute had no application to a man's destruction of *his own property,* and that, for the purposes of ownership, the lessee, as in cases of arson and burglary, was to be deemed the true owner. He said:

> "But, in truth, the facts would not support an indictment in any form; because, in the opinion of the Court, the case is not within the act. For, although it protects houses and enclosures from destruction or injury, *yet necessarily an exception is to be implied, when the destruction or damage is by the owner.* * * * *The act, therefore, renders criminal wilful injuries by one person on the houses or enclosures of another person;* and there is no reason, why in this case, as in others, the property is not to be deemed in him, who is at the time in the rightful possession. *If it had been intended to embrace the acts of wilful waste by a tenant,* there would have been *express words to take in the case where the premises are in the possession of the offender as*

well as in that of another person; as in the modern English Statute, making it criminal to burn certain houses with an intent to defraud or injure any other person, whether in the possession of the accused or of another. *Without some such provision, this act does not extend to waste by a tenant; and if he would not be guilty, neither can one who acts with him by his directions.*" (Emphasis supplied.)

To violate the statute "there must be a *trespass.*" *State* v. *Jones*, 129 N. C. 508, 509.

The universality of this rule of statutory construction, as to all statutory offenses against property, is manifest from a brief consideration of other cases. Thus a statute that prohibited the theft by *any* person, "whether employed in the Post Office or otherwise," of letters or packages from the Post Office or the mails, was held to have no application to one taking or abstracting one's *own* property, even though such person was a postman (*Regina* v. *Moranda*, 11 S. W. S. C. R. 152).

So, too, a statute making it a criminal offense for *any* servant to embezzle money received on his master's account was held to have no application to a servant's taking such money if it was his *own* (*Rex* v. *McGregor*, 3 Bos. & P. 106).

Likewise, a statute, making it a crime for *any* person to obtain property by false pretenses, was held to have no application to a man's procuring, by such means, possession of his *own* goods (*Martin* v. *Regina*, 3 N. & P. 472).

An indictment that merely follows the general wording of a statute and fails to lay the ownership of the property in some one other than the defendant, charges no offense whatever. Lord Denman, C. J., in construing and applying the general language of 7 and 8 Geo. IV, c. 29, in *Martin* v. *Regina*, *supra*, said:

> "In this case not only is the offence not described with convenient certainty, but no offence is described at all. Several offences are provided for by the 7 & 8 Geo. IV, c. 29, in such a way that the mere words of the statute do not describe any offence whatever. Thus sect. 22 makes it a misdemeanor to destroy or conceal *any* will. And sect. 33 makes it an offence to kill *any* house dove, although of course a person may destroy *his own* will or house dove *at pleasure.* Such general language, if copied in an indictment, would be insufficient * * *." (Emphasis supplied.)

And in the report of the same case, *sub nom. Regina* v. *Martin*, in Adolphus & Ellis (8 A. & E. 481), Patteson, J., is reported as saying:

> "In fact stat. 7 and 8 G. 4, c. 29, seldom does, in words, make it requisite that the goods, etc., should be those of another: *yet that must be always meant.*" (Emphasis supplied.)

In *Regina* v. *Langford, et al.*, Car. & M. 602, was construed the application of 7 & 8 Geo. IV, c. 8, which provided, in most general terms,

> "That if any Persons, riotously and tumultuously assembled together to the Disturbance of the Public Peace, shall unlawfully and with Force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy, * * * any House, * * * or any Building, * * * or any Machinery, * * * or any Steam Engine", etc., "every such offender shall be guilty of Felony, and, being convicted thereof, shall suffer Death as a Felon."

On the trial of an indictment thereunder, one of the defendants named Phillips, who had been living in the house, claimed that the house had been given to him and that, in doing the acts complained of, he was under the

impression that he was merely demolishing his own property.

The jury was charged by Patteson, J., that

> "even if there was a riot, if you believe that the prisoners *really thought* that *it was young Phillips' house*, and that they did all this *bona fide in the assertion of a supposed right*, that will take the case *out of the operation* of the statute, and the demolition of the house would *not* be felonious, and you *ought to acquit the prisoners.*" (Emphasis supplied.)

Statutes, denouncing, as criminal and in general terms, the destruction of various kinds of property have been similarly construed in uncounted other cases. As typical instances, may be mentioned the following: *Rex* v. *Patrick*, 2 East P. C. 1059; *Commonwealth* v. *Shaffer*, *supra*, 32 Pa. Superior Ct. 375; *Commonwealth* v. *Burford*, 225 Pa. 93; *Dotson* v. *State*, 6 Cold. (Tenn.) 545; *Goforth* v. *State*, 27 Tenn. (8 Humph.) 37; *Rosenberg* v. *State*, 164 Md. 473, 476-477; *Lewis* v. *State*, 27 P. (2d) 363; *Smith* v. *State*, 11 P. (2d) 198; *Dye* v. *Commonwealth*, 48 Va. (7 Gratt.) 662.

And, so far as we can discover no statute prior to the present has ever been construed as embracing the owners of the property within its inhibitions, *unless the owners by express verbiage were included therein.*

Vessels form no exception to the general rule applicable to all other kinds of property. We have called attention, *supra*, to the fact that 18 U. S. C. A., sec. 464, has been similarly construed; that is, as not having any application to the owners of the property whose destruction is thereby prohibited (*U. S.* v. *Cardish*, *supra*, 145 Fed. 242, 248) (E. D. Wis.). And it cannot be questioned, that the same construction must also be given to the complementary statute adopted as the next succeeding section of the same

Act, viz., 18 U. S. C. A., sec 465, which in the most general terms, denounces, as criminal, the malicious burning or attempting to burn, or otherwise destroying or injuring, or attempting to destroy or injure, any other building not covered by sec. 464, or "any vessel, built, building, or undergoing repair," etc.

The statute of 24 Geo. II, c. 45, expressly adopted for the protection of water-borne commerce, provided a much severer penalty for the offence of stealing committed on a *vessel* than that to which the crime of simple larceny was subject. The statute read, in its pertinent part, as follows:

> "That *all and every person or persons* that shall, * * * feloniously steal any goods, wares or merchandise, of the value of forty shillings, *in any ship, barge, lighter, boat or other vessel, or craft,* upon any navigable river, or in any port of entry or discharge, within the Kingdom of *Great Britain;* * * * being thereof convicted or attainted, * * * shall be excluded from the benefit of clergy." (Emphasis supplied.)

A similar statute (12 Anne, c. 7), had likewise denounced stealing in a house as a much more serious offense than simple larceny and provided therefor a much heavier penalty. But it had been held, under that statute, in keeping with the general rule of the common law hereinbefore adverted to, that a man could not be convicted of "stealing in a house," when it was his own. (2 East. P. C. 644). And, in due time, the question arose in the case of *Rex* v. *Madox*, Russ. & Ry. 92, whether the master of a *vessel* could be convicted, under the statute of 24 Geo. II, c. 45, quoted *supra*, of the aggravated offence of "stealing on a vessel," when that vessel was his *own*. The trial resulted in a conviction but, on the case's coming before the judges of England, on a motion in arrest of judgment, the conviction was set aside on the ground that the *owner* of the *vessel* could *not* be con-

victed of the aggravated offense of stealing *aboard her*, since the general words of the statute must be taken, *by implication*, to have *excepted* from their operation and effect, *a vessel's owner and master.*

The same construction was accorded to a similar Massachusetts statute (9 A. L. M. c. 266, sec. 21), which read,

> "*Whoever* steals in a building, *ship, vessel* or railroad car shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than $500 or by imprisonment in jail for not more than two years." (Emphasis supplied.)

The conviction of an owner's wife, thereunder, was reversed in *Comm.* v. *Hartnett*, 69 Mass. (3 Gray), 450. Judge Metcalf, speaking for the Supreme Court of Massachusetts, held, in deference to the common law rule above adverted to, that the general verbiage of the statute (which, it should be noted, was "whoever," the same word as that relied on by the Government here) had no application to the *owner* of a "building, ship, vessel or railroad car," as therein referred to.

A similar statute is now included within the compass of Title 18 of the United States Code Annotated, in the chapter covering "Offenses against foreign and interstate commerce," viz., sec. 409. The words are sweeping in their generality, viz.:

> "*Whoever* * * * shall steal or unlawfully take * * * from any *steamboat, vessel or wharf*, with intent to convert to his own use any goods or chattels moving as, or which are a part of, or which constitute an interstate or foreign shipment of freight or express, * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both * * *." (Emphasis supplied.)

Although this federal statute, like its counterpart, with

which we are here particularly concerned, viz., 18 U. S. C. A., sec. 502, uses the comprehensive term "Whoever," in describing the class of persons subject to its penalties, can there be any doubt, in view of the decisions above reviewed, that it would require to be construed as having no application to *owners* of the "steamboat, vessel or wharf" therein referred to?

Of course, there is nothing to prevent the United States Congress or any other law-making body, where it may constitutionally do so, from making its statutory prohibitions against the destruction of property *expressly and affirmatively* applicable to the *owners* thereof. And in a few, though only a relatively few, cases the statutes have been so worded. But these, when examined, will be found to be statutes aiming not at the mere preservation of property against its owner's will, but, rather, at the prevention of some ulterior fraud or injury to *others*, that the owner might otherwise *maliciously* seek to effectuate through the destruction of his own property. Such are the statutes that make it a crime for the owner of a dwelling house or any other building to burn the same with an intent, not merely to destroy his own property, but, thereby, to *defraud* his *insurers*, or *destroy or injure* the *lives therein* or *property adjacent thereto.*

Such, too, are the statutes that, like 18 U. S. C. A., sec. 491, expressly make it crime for an owner, wilfully and corruptly, to cast away or otherwise destroy his vessel, with intent *to perpetrate a fraud upon her underwriters*, or *upon the shippers of goods* thereon, or *upon any co-owner* of such vessel.

But, as to such statutes, it has long been held that, without words expressly and affirmatively including the owners, they could not possibly be held to have any application thereto. The present 18 U. S. C. A., sec. 491, was originally enacted as the second section of the Act of March 26, 1804, c. 40 (2 Stat. 290). The two sections

were complementary, one, the second, referring to owners expressly and the other, the first, to all other persons, and they read as follows:

> Sec. 1. "That any person, not being an owner, who shall, on the high seas, willfully and corruptly cast away, burn, or otherwise destroy any ship or other vessel unto which he belongeth, being the property of any citizen or citizens of the United States, or procure the same to be done, and being thereof lawfully convicted, shall suffer death."
>
> Sec. 2. "That if any person shall, on the high seas, willfully and corruptly cast away, burn, or otherwise destroy any ship or vessel of which he is owner, in part or in whole, or in any wise direct or procure the same to be done, with intent or design to prejudice any person or persons that hath underwritten, or shall underwrite any policy or policies of insurance thereon, or if any merchant or merchants that shall load goods thereon, or of any other owner or owners of such ship or vessel, the person or persons offending therein being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and suffer death."

In *United States* v. *Vanraust*, 3 Wash. C. C. 146, 28 Fed. Cas. 360, Case No. 16,608, an indictment was tried against the mate of the schooner Lucy for casting away and destroying that vessel on the high seas in violation of the said statute. Evidence was offered (though the indictment included no such charge) that the vessel carried insurance and that a merchant, not identified with her owner, had shipped cargo aboard her. It also appeared that the plan for the vessel's destruction had been laid by the owner and the defendant before she sailed. The third of the contentions advanced on behalf of the defendant was, to quote from the report,

"That the case is not within the act of Congress, since the vessel was destroyed by the orders of the owner, who could not himself have committed an offence by destroying his own vessel, unless in a case coming under the second section; and, of course, a person doing the same thing under his orders, could not be in a different situation. A man burning his own house, is not guilty of arson. 2 East, P. C. 1024."

This contention was sustained.

Mr. Justice Washington, sitting as Circuit Justice, so ruled, and charged the jury as follows:

"3. As to this point, the court is of opinion, that the case of the defendant is within the first section of the law, if, in point of fact, he was concerned in the destruction of this vessel. The defendant is a person, not an owner, who (if he committed the act) willfully cast away a vessel unto which he belonged, being the property of a citizen of the United States. But did he do it corruptly? If no person but the owner was interested in the property, it was not; because the owner might destroy his own property himself, or cause it to be done, without committing an offence against this, or any other law. But in this case, there were insurers on vessel and cargo, and a cargo on board, belonging in part to other persons than the owner. It was corruptly done as to those persons. Had the owner, in this case, done it, he would have been guilty under the second section; only, that in that case, the indictment must have stated that it was done to the prejudice of the underwriter on the vessel, or of a merchant that had loaded goods in the vessel."

The jury returned a verdict of not guilty.

Likewise, an owner may not properly be charged with conspiracy to violate the second section of the Act of March 26, 1804, *supra*, now 18 U. S. C. A., sec. 491, unless he is charged with having done so in order to wrong underwriters, shippers or co-owners (*United States* v. *Murphy* [D. C. S. D. Ala.], 50 F. [2d] 455). In that case, the master, having been indicted for conspiring with his crew wilfully and corruptly to cast away his vessel, demurred to the indictment on the ground

> "that he, being the owner of the vessel, had the right to cast her away if he saw fit, and therefore he had the right to direct the members of the crew to cast her away."

The demurrer was sustained by Judge Ervin, who, after citing *United States* v. *Vanranst, supra*, said (457):

> "Taking the construction of the act by Justice Washington as being correct, and I agree with him in his construction, the act declares no penalty against the owner of the vessel unless he has the intention to prejudice a person that may underwrite a policy of insurance thereon, or a merchant that may have goods thereon, or any other owner of such vessel. For, as Justice Washington says, *the owner might destroy his own property himself or cause it to be done without committing any offense against this or any other law.*"

It is to be noted that, when Judge Ervin's decision was handed down (1931), the statute with which we are here concerned (18 U. S. C. A., sec. 502), had been on the statute books for a period of 14 years. And, if it means what the respondent now claims it to mean, then Judge Ervin was entirely in error in saying what he did; and the indictment, instead of being insufficient, was perfectly valid and should have been sustained on the theory of *United States* v. *Hansee*, 79 Fed. 303.

We prefer to think that Judge Ervin was right, and that cardinal rules of the common law, such as that entitling an owner to cast away his own property, are derogated from or swept away never by mere general expressions of a statute, but only by specific and particular terms expressly and affirmatively so providing.

> "It was, no doubt, within the power of Congress to abolish a well-known rule of construction, as it did in the act of 1875; but, until so abolished, it remained in force."
>
> *Arthur* v. *Morrison,* 96 U. S. 108, 112.

The Act of June 15, 1917, c. 30 (40 Stat. 220), like that of March 26, 1804, c. 40 (2 Stat. 290), also contained a section (section 3 of Title II) expressly and affirmatively applicable to vessel-owners (*supra,* 12-13, footnote), not in order to save their property as such against their will, but to prevent their accomplishing, by that means, a wrong on others, viz., destruction or damage to the lives and property or ways and facilities within a port of the United States.

But Title III of that same act (18 U. S. C. A., sec. 502), is not a statute within that category. It does *not* contain words *expressly and affirmatively* making it applicable to the *owners* of the vessel therein referred to. Nor does it seek to achieve aught save the preservation of the vessels and their contents, animate and inanimate. Therefore, for the reasons above discussed, it must be interpreted, we submit, despite the sweeping generality of its terms, as *impliedly excepting* the *owners* from its operation and effect.

Below Judge Parker refused to construe the statute in the light of the common-law principles above adverted to. He gives no reasons, for thus failing to do so, save the use of what he terms "the all-inclusive 'whoever'" (*Bersia* v. *United States, supra,* 314); the *thought* that the statute

was meant "to forbid and punish just such conduct" (though stating no basis for such *thought*) (*id.*, 313); and the idea that *Wierse* v. *United States* (C. C. A., 4th Cir.), 252 Fed. 435, 441, furnished a basis for the statute (*id.*, 314). The first two reasons are scarcely satisfactory. And, as to the third, we show *infra* (59-60) that the *Wierse case* was a case of scuttling a laid-up ship in a port of the United States and blocking the channel of navigation in said port, viz., Charleston harbor, and, therefore, would logically explain sec. 3 of Title II (50 U. S. C. A., 193); whereas *Daeche* v. *United States* (C. C. A., 2d Cir.), 250 Fed. 566, was a case involving an attack upon vessels engaged in the foreign commerce of the United States and, therefore, might more logically be deemed the inspirational source of this statute, viz., Title III (18 U. S. C. A., sec. 502).

But, whether the *Wierse case* or the *Daeche case* may have been present in the legislative mind, is not the point. There are well-defined rules of statutory construction to be applied in such a case. And they should have been applied.

Judge Parker, it is true, in discussing the sufficiency of the indictment at another point, says (314):

> "As the acts denounced by the statute were not crimes because committed against the owners of the vessels but because of the injury to instrumentalities of foreign commerce, it was not necessary to allege ownership. The decisions relied on by appellants, relating to charges of larceny and malicious injury to personal property at common law, manifestly have no application."

In other words, as we understand Judge Parker's meaning, he is saying, in effect, that Congress has, by this legislation, made a "sacred cow" out of every vessel engaged in foreign commerce; has guaranteed its safety from molestation, even at the hands of its very owner.

This is remarkable doctrine; especially so, when we consider that never before in any Anglo-Saxon country, in either hemisphere, has any legislature undertaken thus to venerate, and make sacrosanct, inanimate, or even animate, chattels. What is the basis for the learned Judge's departure from the well-defined previous and ancient course of judicial construction? Certainly there is nothing in the language of the statute that justifies it. The words of the statute are general, just like the words of the thousands of other statutes dealing with offenses against property. If we are to attribute to Congress an intent to deviate from universal legislative practice, in the adoption of this particular act, must we not demand that Congress should have indicated that intent, not in the general phraseology found in all statutes, but in precise and particular terms appropriate to such a remarkable innovation and leaving no doubt that such was in fact its true intent?

> "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed *with irresistible clearness* to induce a court of justice to suppose a design to effect such objects." (Emphasis supplied.)
>
> Ch. J. Marshall in *Fisher* v. *Blight,* 6 U. S. (2 Cranch) 358, 390.

Judge Parker says the purpose of the act is, not to protect property rights *in* the vessels, but the vessels themselves as "instrumentalities of foreign commerce." But what better way of protecting the instrumentalities of foreign commerce than by protecting the property interests therein? What more usual way? Could the learned Judge name one other piece of legislation in this or any other English-speaking country, having for its object the preservation or promotion of foreign commerce, that has proceeded otherwise than by protecting and fostering the

rights of property represented in its instrumentalities and other subjects?

Let us look at Title IV of the same act, which immediately follows the title here in question and which seeks to protect our foreign commerce by protecting its *cargoes*, as this title protects its *vessels*. To be consistent Judge Parker would have to say that Congress, in Title IV, was protecting the cargoes *as such, not the property rights therein*. But a glance at the legislative background, to which, in order to remove all doubt, we may resort (*Wright* v. *Vinton Branch*, 300 U. S. 440, 463), will at once disprove any such proposition. Said Mr. Graham, a member of the Judiciary Committee, in reporting on the meaning and purpose of Title IV (discussed more at length in another connection *infra* [82-84]):

> "What we want to get at is those efforts to *interfere* by violence with the exercise of *rights* that belong to the American citizen *in respect to* foreign commerce that can be legitimately carried on during a time of war. * * * We thought * * * we ought to make a provision by which the Federal power * * * should pursue those *who seek to violate the law* and *attempt to destroy property for their own malicious purposes* in seeking to *interfere* with the exercise of *legal rights* on the part of American citizens." (55 Cong. Rec. 1720, cols. 1-2; emphasis supplied.)

Is this not plain? Is it not clear that Congress, in thus dealing with the subjects of foreign commerce, the cargoes themselves, sought their safety through protection afforded to the *property rights* enjoyed *in respect to* them; not by making fetiches of such cargoes in and of themselves?

If so, why view the purpose of Congress as anything different or otherwise, in seeking in the companion Title III, to assure the safety of the carriers of those cargoes? How better safeguard them than by safeguarding the property rights existing therein?

A great deal more might be said for Judge Parker's conclusion, if the statute had been limited in its application to *war-time* and have *avowedly* looked to the preservation of all those kinds of things which were useful to the *national defense* or the *prosecution of the war.* Such *was* the Sabotage Act of April 20, 1918, c. 59, 40 Stat. 533, (50 U. S. C. A., secs. 101-103).*

But even *that* act, to which we may appropriately look, in order to clear up doubt as to the purport and purpose of the other, (*United States* v. *Freeman,* 44 U. S. [3 How.]

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*That statute, including its chapter heading, as originally enacted, read as follows:

"CHAP. 59.—An Act To punish the willful injury or destruction of war material, or of war premises or utilities used in connection with war material, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the words 'war material' as used herein, shall include arms, armament, ammunition, livestock, stores of clothing, food, foodstuffs, or fuel; and shall also include supplies, munitions, and all other articles of whatever description, and any part or ingredient thereof, intended for, adapted to, or suitable for the use of the United States, or any associate nation, in connection with the conduct of the war.

The words 'war premises,' as used herein, shall include all buildings, grounds, mines, or other places wherein such war material is being produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported, together with all machinery and appliances therein contained; and all forts, arsenals, navy yards, camps, prisons, or other military or naval stations of the United States, or any associate nation.

The words 'war utilities,' as used herein, shall include all railroads, electric lines, roads of whatever description, railroad or railway fixture, canal, lock, dam, wharf, pier, dock, bridge, building, structure, engine, machine, mechanical contrivance, car, vehicle, *boat* or aircraft, *or any other means of transportation whatsoever, whereon or whereby such war material or any troops of the United States or of any associate nation, are being or may be transported either within the limits of the United States or upon the high seas;* and all dams, reservoirs, aqueducts, water and gas mains and pipes, structures and buildings, whereby or in connection with which water or gas is being furnished, or may be furnished, to any war premises or to the military or naval forces of the United States, or any associate nation,

556, 564-565; *Tiger* v. *Western Improvement Co.*, 221 U. S. 286, 309), had, according to the Committeemen who framed the legislation and reported it out onto the floor of the House, *no* such purpose as that conceived by Judge Parker. It was designed, according to its originators, not to deify the things, independent of their ownership, but merely to prevent their *malicious* destruction. Its object was, according to its drafters, to enable the Federal

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and all electric light and power, steam or pneumatic power, telephone and telegraph plants, poles, wires, and fixtures and wireless stations, and the buildings connected with the maintenance and operation thereof used to supply water, light, heat, power, or facilities of communication to any war premises or to the military or naval forces of the United States, or any associate nation.

The words 'United States' shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States

The words 'associate nation,' as used in this Act, shall be deemed to mean any nation at war with any nation with which the United States is at war.

SEC. 2. That when the United States is at war, whoever, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, or whoever, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, shall willfully injure or destroy, or shall attempt to so injure or destroy, any war material, war premises, or war utilities, as herein defined, shall, upon conviction thereof, be fined not more than $10,000 or imprisoned not more than thirty years, or both.

SEC 3 That when the United States is at war, whoever, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, or whoever, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, shall willfully make or cause to be made in a defective manner, or attempt to make or cause to be made in a defective manner, any war material, as herein defined, or any tool, implement, machine, utensil, or receptacle used or employed in making, producing, manufacturing, or repairing any such war material, as herein defined, shall, upon conviction thereof, be fined not more than $10,000 or imprisoned not more than thirty years, or both." (Emphasis, other than that of enacting clause, supplied.)

Government to punish the *malicious mischief* theretofore punishable by, but only by, the State Governments.

Mr. Webb, the chairman of the House Judiciary Committee, in reporting out Senate Bill 383 (65th Congress, 2nd Session), which the Committee had entirely rewritten, preserving only its designation, and which, as so rewritten, subsequently became the law, said, *inter alia*, that

> "this is a remedy which is *additional to what the State has against these very same offenses.* We are defining offenses *which are now punishable under the State laws,*" etc. (Vol. 56, Cong. Rec., Part 3, p. 3112). (Emphasis supplied.)

Mr. Caraway, a member of the Committee, in explaining the purpose of the bill, said:

> "It undertook to make a penal offense where anyone willfully destroyed or undertook to destroy certain properties, if he had the intent to destroy the property to injure the Government or had reasonable information to believe that his act would interfere with the prosecution of the war. Broadly speaking, it merely gives to the Federal courts the power to punish *malicious mischief; that is all.*" (*Id.*, 3117.) (Emphasis supplied.)

And, further on, the same Committee member repeated:

> "We are undertaking, as I said, to extend the jurisdiction of the Federal court to punish *malicious mischief.*" (*Id.*, 3118.) (Emphasis supplied.)

To the same effect spoke Mr. Dyer, another member of the Committee, who said:

> "These provisions that this bill affects, and for which it would punish, *are all now taken care of by States.* There are laws *in every State* that prohibit in effect *everything* that is covered by this bill." (*Id.*) (Emphasis supplied.)

And Mr. Igoe, still another member of the Committee, expressed the same view of the bill's purpose, saying:

> "The bill, as I understand it—and I am sure that that *is* the purpose of the bill—is to make a *Federal* offense of what is *now* a *State* offense in the States for *willful and malicious destruction of property.*" (*Id.*, 3119.) (Emphasis supplied.)

Here, were, then, four members, including the Chairman, of the House Judiciary Committee, which was responsible for the bill, informing the House at large that the purpose of the bill was merely to denounce, for the duration of the war, as a Federal offense, *that which was already denounced by all States as a State offense*, viz., *the malicious destruction of personal property.* And against that view was registered not one dissenting voice.

Clearly, therefore, as to the Sabotage Act itself, confined as it was merely to war-time operation, Judge Parker would never have been justified in saying, as he did about U. S. C. A. 502, which was applicable alike in war *and* peace, that

> "The decisions relied on by appellants, relating to * * * malicious injury to personal property at common law, manifestly have no application." (*Bersia* v. *United States, supra*, 314.)

Founded, as it has thus been shown to have been, upon the very State statutes that denounced, as a State offense, the common-law crime of *malicious mischief*, what decisions could be more appropriate to the interpretation of the Sabotage Act than those same decisions relating to malicious destruction of personal property at common law?

But, if the Sabotage Act itself was designed, not to preserve an owner's property against his will, but simply to protect his proprietary interest therein, how much more so must that have been true of Title III of the Espionage Act

(18 U. S. C. A. 502)! For the latter statute was not, as was the other, confined to war purposes; was not, as was the other, projected, avowedly, to further National defense or aid in the prosecution of the war, the business solely of the National Government; but was, as its express language shows, aimed merely at the protection of the foreign commerce of the United States, the business primarily, not of the Federal Government, but of the individual proprietors thereof and operators therein.

If it sufficed the National Government's war purposes, in the deadly hour of conflict, to protect private property useful thereto, by protecting the proprietary interest therein, how much more must that sort of protection have sufficed the ends of our foreign commerce in legislation designed alike for war *and* peace!

It has always been the Anglo-Saxon way in jurisprudence, to protect the *rights* of persons in and to chattels; not to sanctify the chattels themselves. If not, let the respondent cite *just one* instance *to the contrary!*

2.

The effect of a criminal statute must, as against an accused, be restrained to the unmistakable scope of the words actually used.

> "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used."
>
> (*United States* v. *Resnick*, 299 U. S. 207, 209.)

Hence, a receiver of a national bank will not be deemed an "agent" thereof within the meaning of the federal statute providing a punishment for the officials or agents of such a bank who embezzle its funds (*United States* v. *Weitzel*, 246 U. S. 533); to carry or tranport spirituous

liquor between States of the Union will not be held to contravene a federal statute that makes it unlawful to "knowingly ship or cause to be shipped" such merchandise from one state to another (*Arnold* v. *United States*, [C. C. A., 8th Cir.], 115 F. [2d] 523, 527); an airplane will not be considered a "self-propelled vehicle not designed for running on rails" within the meaning of the National Motor Vehicle Theft Act (*McBoyle* v. *United States*, 283 U. S. 25); nor will an automobile be deemed a "carriage" within the meaning of a criminal statute prescribing a punishment for failure to pay the lawful fare for the use of a "carriage" (*Commonwealth* v. *Goldman*, 205 Mass. 400).

In *United States* v. *Weitzel*, *supra*, in answer to the Government's contention that "the punishment of defalcation by a receiver is clearly within the reason of the statute and that, unless the term 'agent' be construed as including receivers, there was no federal statute under which an embezzling receiver of a national bank could have been prosecuted," this Court, by Mr. Justice Brandeis, said (542-543):

> "The argument is not persuasive. Congress may possibly have believed that a different rule should be applied to an officer of the United States who is selected by the Comptroller for a purpose largely different from that performed by officers of the bank, and who gives bond for the faithful discharge of his duties. * * * *Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive.* *Todd* v. *United States*, 158 U. S. 278, 282; *United States* v. *Harris*, 177 U. S. 305." (Emphasis supplied.)

a.

To restrict the scope of the term "tamper" to its ordinary meaning and signification, precludes the application of the statute to any but trespassers.

These defendants were indicted for *tampering with* the motive power and instrumentalities of navigation of their own vessel. The words of the statute on which that charge was based are "Whoever * * * shall tamper with the motive power or instrumentalities of navigation * * *, shall be," etc.

"Tamper" as used in ordinary, every-day speech, by the ordinary, average man, refers to an act of *meddling,* to *interference* with one's concerns by *another.*

The dictionaries so define it. Webster's New International Unabridged (2d Ed.) gives two definitions of the word when used in a connection such as the present. These are as follows:

> "3. To *meddle* so as to alter a thing; esp. to make corrupting or perverting changes; as, to *tamper* with a document or text; to *interfere* improperly.
>
> "4. To *meddle;* to busy oneself rashly; to try trifling or foolish experiments; commonly with *with;* as, to *tamper* with a disease." (Emphasis on "meddle" and "interfere" supplied.)

The New Standard Dictionary (1924 Ed.) defines "tamper" as follows:

> "1. To experiment officiously, foolishly, or impertinently; *meddle.*"
>
> "2. Specif.: To *interfere* or make alterations so as to pervert or vitiate; as, to *tamper* with a manuscript." (Emphasis on "meddle" and "interfere" supplied.)

It will be observed that in these definitions the predominant idea is that of *meddling* or *interfering*. And both connote *not* actions with one's *own* concerns, but *intrusion* into the affairs of *others*.

Thus Webster, in defining "meddle", says:

> "To MEDDLE (with or in) is to concern oneself officiously or impertinently with *another's* affairs." (Emphasis supplied.)

And, in defining "interfere," the same authority gives, as its only meaning pertinent here, the following:

> "3. To enter into, or take a part in, the concerns of *others;* to *intermeddle; interpose; intervene.*" (Emphasis supplied.)

And, as to the last three terms, in this definition of "meddle" last above quoted, we find that, according to Webster, "intermeddle" means

> "To meddle with the affairs of *others*" (Emphasis supplied);

to "interpose" is

> "To put oneself forward in the affairs of *others*, with or without propriety, as the case may be" (Emphasis supplied); and

to "intervene" is

> "To come in between by way of hindrance or modification; to *interpose;* as to *intervene* to settle a quarrel." (First emphasis supplied.)

Thus we see that to "meddle" and to "interfere," the predominant ideas in "tamper," involve, according to Webster, the ever present idea of obtruding oneself upon the affairs of *others*.

The New Standard agrees. It defines "meddle" as meaning:

> "1. To participate or *interfere* officiously; *interpose* impertinently in the affairs of *another;* touch or handle a thing or the concerns of *others* unnecessarily and without request; frequently followed by *in* or *with.*" (All but last two emphases supplied.)

And it defines "interfere" as:

> "1. To enter into or take part in the concerns of *others,* especially to prevent some action; *interpose;* sometimes in a bad sense, to *intermeddle.*" (Emphasis supplied.)

The underlying idea of "tamper" is, therefore, that of obtruding oneself upon, and busying oneself with, the concerns of *others.* In any ordinary statute, therefore, relating to one's *tampering* with an object, the understanding must necessarily be that the object referred to is that of *another.* And, if that be true of any ordinary statute, how much truer must it be in the case of a criminal statute making a felony, of such an offense, that could, on conviction, send the accused to prison for a half of his adult life!

Even if the astuteness of respondent's counsel could establish that there is *also* lexicographic authority for the use of the term "tamper" in the sense urged by the Government, as the Government *did,* in respect to the term "ship," in *Arnold* v. *United States,* (527), *supra,* still there could be no question that the *primary* and *ordinary* meaning would have to *control,* as it did there, in the construction of a *criminal* statute.

There is, also *legal* as well as lexical, authority for confining the meaning of "tamper" to unlawful intrusion in the concerns of *others.*

It has judicially been so construed, as used in a criminal statute (*Keefe* v. *Donnell,* 92 Me. 151, 159).

It has been so used in a variety of statutes, analogous to the statute here under consideration and aimed at the same type of malicious injury to property. It is so used in section 1425 of the New York Penal Code, subdivision 15; a statute bearing great similitude to the one here under consideration. It reads:

> "A person who wilfully:
>
> * * * * *
>
> 15. Cuts, spoils or destroys any cordage, cable, buoys, buoy-rope, head-fast or other fast fixed to the anchor or moorings belonging to any *vessel, or who shall, with intent to injure, tamper in any way with* the lines or cables by which *any vessel* is moored or made fast, *or who shall, with intent to injure, tamper in any manner with* the *steering-gear,* bell-gear, *engines, machinery,* lights *or any other equipments* of any *vessel,*
>
> Shall be deemed guilty of a misdemeanor." (Emphasis supplied.)

That statute was first enacted May 12, 1896, as c. 552, sec. 1, of the Laws of New York of the 119th session of the State Legislature, and may very well have been the prototype and precursor of 18 U. S. C., sec. 502. Whether that be so or not, it is evident on its face that the word "tamper," as there used, could *not* have been meant to connote action by an *owner* or *those acting on his instructions.*

The New York statute just quoted was evidently the model after which was fashioned the almost identical statute enacted in the State of Washington in 1909 (Laws of Washington, 1909, sec. 407, p. 1019; Remington's Rev. St. of Washington, Vol. IV, Title XIV, sec. 2659), which reads:

> "Injury to property. Every person who shall willfully—
>
> * * * * *

> 13. Injure, destroy *or tamper with any* rope, line, cable or chain with which any vessel, scow, boom, beacon or buoy shall be anchored or moored, or the *steering-gear,* bell gear, *engine, machinery,* lights *or other equipment* of any *vessel;*
>
> * * * * *
>
> shall be guilty of a misdemeanor."

The word "tamper" has been used, as connoting a trespass, in sec. 4235 of the North Carolina Code of 1939. That statute reads:

> "*Tampering* with engines and boilers.—If any person shall wilfully turn out water from any boiler or turn the bolts of any engine or boiler, or meddle or *tamper* with such boiler or engine, or any other machinery in connection with any boiler or engine, causing loss, damage, danger or delay to the *owner* in the prosecution of this work, he shall be guilty of a misdemeanor." (Emphasis supplied.)

It is used in the same sense in Comp. Gen. Laws of Florida, Fifth Div., Part I, Tit. II, c. IV, art. 14, sec. 7428 (1), which makes it unlawful "to tamper or meddle with any meter" of any "electric, gas or water plant owned or controlled by any person, firm or corporation, private or municipal."

Similarly, Secs. 12,508, 12,512 and 12,512-1, Ohio Gen. Code, relating to public utilities, employ the term "tampering" solely in reference to acts of persons other than the owner and his duly authorized servants.

The same restricted usage occurs in Title 18, Pa. St. Ann., secs. 3371, 3373, dealing with public utilities.

Likewise in Title 28, Mich. St. Ann., sec. 26.648, "tampering" is used as comprehending various acts of meddlesome interference with automobiles by trespassers.

And the same restricted usage of the term is found in the Texas Penal Code, Title 17, sec. 1344.

It occurs in the same sense in Kansas Gen. Stat. (1935), c. 21, Art. 5, sec. 580, in reference to interfering with electric meters; in New Jersey Stat. Ann., Title 2, c. 162, sec. 1, with respect to interference with steam railways; in Col. Stat. Ann. (1935), c. 48, sec. 393, in connection with meddling with automobiles; and in the Penal Code of California (1941), Part I, Tit. 14, sec. 625a, in a statute prohibiting meddlesome trespasses against fire-alarm apparatus.

And it is used with the same meaning in the Gen. Laws of Rhode Island (1938), c. 608, sec. 57, in a statute aimed against tampering or meddling with the appliances of water and gas light companies; and in the West Virginia Code of 1937, sec. 5986, in a statute making it unlawful to tamper with water and gas pipes and electric wiring.

In view of this common usage of the term "tamper" in criminal statutes of the kind here under discussion, and always in a sense connoting meddlesome interference by trespassers, but never action by the owner or his duly authorized agents, it would seem clear that the courts below were not justified in treating the term as applicable to one's management of one's own property.

And, it is proper, in construing the meaning of a term as used in a federal criminal statute, to consider the meaning ascribed to the same term in criminal statutes of the various states. In *McBoyle* v. *United States, supra*, this Court, in construing the word "vehicle" as not embracing an airplane, referred to the meaning of the term as used in numerous State statutes and there limited in its application to conveyances that did not leave the earth. We may, and, in view of the important issues at stake, we should, do as much here.

We have thus shown the plethora of lexical and legal

authority to the effect that the primary and ordinary meaning of "tamper" involves the idea of an intrusion into, or interference with, the concerns of *others*. Now let the respondent show us *just one* authority pointing in the *opposite* direction!

Judge Parker gave us none. On the contrary, while accepting our premise, he refused to accept the only possible conclusion derivable therefrom. For he admitted our contention that "tampering" means "improper interference," and *improper interference* can *only* mean intrusion in the concerns of *others* (*supra*). He said:

> "As used in the statute, it means, we think, any sort of *improper interference* with the machinery, which is denounced as criminal only if accompanied by the described intent" (314).

"Interference," as the authorities noted *supra* (44-45) show, can only refer to one's trespassing upon or into the affairs of *others;* one cannot "interfere" with one's *own* property or business. The lexicographers are unanimous on this point. And "improper interference," in the eyes of the law, must be that kind of interference which the law denounces as wrongful (*Roesel* v. *State,* 62 N. J. law 216, 226).

So, if we adopt Judge Parker's definition of the meaning of "tamper" and substitute it in place of that term in the statute, this will read:

> "Whoever * * * shall *improperly interfere* with the motive power or instrumentalities of navigation * * * shall be," etc. (Emphasis supplied.)

But that means, according to every recognized standard of good, ordinary every-day English, as shown *supra*, "whoever shall wrongfully make trouble with, or pervert, the motive power or instrumentalities of navigation of *others, not* his *own.*"

3.

The statute must be read in connection with other statutes *in pari materia.*

> "It is a rule in the construction of statutes, that all relating to the same subject matter shall be considered together."
>
> *United States* v. *Babbitt,* 66 U. S. 55, 60.

Mr. Chief Justice Taney, in expounding the same principle in *Brown* v. *Duchesne,* 19 How. (U. S.), 183, 194, a patent case, said:

> *"The general words* used in the clause of the patent laws granting the exclusive right to the patentee to use the improvement, *taken by themselves,* and literally construed, without regard to the object in view, would seem to sanction the claim of the plaintiff. *But this mode of expounding a statute has never been adopted by any enlightened tribunal*— because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish. *And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject)* and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning." (Emphasis supplied.)

a.

The statute here in question, construed together with related statutes, can apply only to trespassers.

We have already adverted to the confusion (*supra*) between 50 U. S. C. A., sec. 193, and 18 U. S. C. A., sec. 502, that has characterized the Government's case. These statutes constituted, as hereinbefore pointed out at pages 11 to 14, where they are quoted at length, two closely adjacent sections of the same act of Congress; one constituting the next to the last section (that is, 3) of Title II, and the other constituting sec. 1 of Title III (40 stat., 220-221). The former was *special*, relating to vessels' owners, officers and crews; the other *general*, relating to all embraced in the terms "whoever," etc. It is a necessary presumption, because both were sections of one and the same act, that each was adopted, with reference to the other, and was meant to occupy a distinctly separate place and achieve a distinctly separate end in the system of legislation that the various sections of that act were meant to comprehend.

That the two types of offence denounced in the respective sections were understood to be quite different, is obvious from the different scales of punishment provided for their respective violations. For the offence of wilfully injuring or destroying a vessel, as denounced in the earlier section, a maximum imprisonment of but two years was provided. But, for the violation of the later section, that is, doing any act that was designed to injure or destroy her safety, a maximum term of imprisonment *tenfold as great* was authorized. This difference necessarily meant that Congress regarded the offence denounced in Title III, (18 U. S. C. A., sec. 502), as a much graver and more serious infringement of the penal law than that defined in sec. 3 of Title II (50 U. S. C. A., sec. 193). (*United States*

v. *Saglietto*, [D. C. E. D. Va.], 41 F. Supp. 21, 29; *United States* v. *Martini*, [D. C. S. D. Ala.], 42 F. Supp. 502).

But, if the prospective offenders, aimed at in the earlier statute, were also to be included as those aimed at in the later section, the discrepancy in the scales of punishment would amount to a palpable absurdity. That is, if the owner and officers and crew of a vessel *completely destroyed* her, and *blocked up the only channel* through which shipping might enter and leave a given port, they would be liable under the statute, whose prohibitions were *expressly* directed against them, only to a maximum of *two years'* imprisonment. But if they *only attempted* to do so, they would be liable, if section 502 applied to them, to a maximum imprisonment of *twenty years! That just doesn't make sense.*

The only way in which these two sections of the same general act can be reconciled is to make each applicable to a *different* class of offenders. The express wording of the earlier section shows that it was of *special* application and was meant to apply primarily, if not exclusively, to those who owned or were attached to the injured or destroyed ship. And, as to the later section, which was of *general* application, we have already seen that the wording there adopted, when read, as it must be, in the light of the principles of the common law and its own phraseology, excludes the owners of, and those attached to, the damaged or destroyed ship; leaving as the class of offenders contemplated only trespassers against the title and possession of the ship.

This reconciliation of the respective functions of the two sections of the act produces also a result that comports with justice and reason. The offence that involves the less moral obliquity and turpitude receives the less punishment; and the crime that constitutes the much more brazen and culpable invasion of moral and legal right, receives a penalty corresponding with its greater gravity.

For an *owner*, through his officers and crew, to dismantle and destroy his *own* ship, does not greatly shock or offend one's moral sense of right or decency. But, for a *trespasser* to *invade* the precincts of *another's vessel*, and, "out of a spirit of wanton cruelty or black and diabolical revenge," to damage or destroy her, does shock the feelings of the most morally obtuse, and cries aloud for the infliction of a punishment of no ordinary kind.

(1).

Where one of two statutes or sections of a statute deals specially with a particular group of members in a given class, and the other with the class as a whole, the former is regularly treated as an exception to the latter.

In *United States* v. *Chase*, 135 U. S. 255, the question up for decision was whether a letter was a "writing" within the meaning of the act of July 12, 1876, 19 Stat. 90, c. 186, making it an offense to send an obscene "writing" through the mails. In a clause entirely distinct from that in which the ban was imposed upon *every "writing,"* a punishment was imposed upon anyone sending a "letter" through the mails "upon the envelope of which" appeared obscene matter.

In ruling that the term "writing," as so used, did not include a letter, this Court said, by Mr. Justice Lamar (260):

> "It is an old familiar rule that, 'where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the *particular* enactment *must be operative*, and the *general* enactment *must be taken to affect only such cases within* its general language ***as are not within*** *the provisions of the particular enactment.' Pretty* v. *Solly*, 26 Beavan, 610, per Romilly, M. R.; *State*

> v. *Comm'rs of Railroad Taxation*, 37 N. J. Law, 228. This rule applies wherever an act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include. Endlich on the Interpretation of Statutes." (Emphasis supplied.)

Rodgers v. *United States*, 185 U. S. 83, involved the claim of a rear admiral to arrears of salary claimed to be due under sec. 13 of the "Navy Personnel Act" of March 3, 1899, c. 413, which provided that naval officers should receive the same pay as that received by army officers of the corresponding rank. And, under the law, a rear admiral ranked with a major general. But sec. 7 of the same act specially treated of rear admirals and provided that "each rear admiral embraced in the nine lower numbers of that grade," of whom Rodgers was one, there being eighteen in all, "shall receive the same pay and allowance as are now allowed a brigadier general in the army." The question, therefore, was as to which of these sections of the same statute was operative in fixing the amount of the claimant's pay.

It was held that the earlier and *special* section should be construed as an exception to the later *general* section and, therefore, be controlling as to the special group (including the claimant) that fell within its limited scope.

Mr. Justice Brewer, writing the opinion for the Supreme Court and quoting from *Crane* v. *Reeder*, 22 Mich. 322, 334, said (89):

> "Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provi-

> sion, especially when such general and special acts or provisions are contemporaneous, as the legislature is not to be presumed to have intended a conflict."

Applied here, the rule results in excepting, from the general class of persons, covered by the word "whoever," in 18 U. S. C. A., sec. 502, all owners, officers and crews, or other persons in charge, causing injury or damage to their own ships.

There is, also, at least one other statute besides 50 U. S. C .A., sec. 193, that forbids the imposition on the defendants of the pains and penalties provided by 18 U. S. C. A., sec. 502. We refer to the act of June 7th, 1872, c. 322, sec. 51, 17 Stat. 273-274, as amended (46 U. S. C. A., sec. 701, subdivision 7), which reads as follows:

> "Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offences, he shall be punished as follows:
>
> * * * * *
>
> Seventh: For *willfully damaging the vessel*, or embezzling or willfully damaging any of the stores or cargo, by forfeiture out of his wages of a sum equal in amount to the loss thereby sustained, and also, at the discretion of the court, by imprisonment for *not more than twelve months*." (Emphasis supplied.)

This provision of law, it is held, is applicable to foreign seamen while their ships are in United States waters. *United States* v. *McArdle* (D. C. Or.), 2 Sawy. 367, 26 Fed. Cas. 1042, Case No. 15,653. And it certainly is applicable to seamen on ships of United States registry in all waters.

This statute, it will be observed, deals with a special group, seamen, in relation to trespasses committed upon their own ships *to the hurt of the vessel-owner;* and is, therefore, not only to be treated as an exception to 18

U. S. C. A., sec. 502, (under the rule last above adverted to), but also to be distinguished from 50 U. S. C. A., sec. 193, which relates to the acts of seamen done at the instance of, and *in cooperation with, the vessel-owner,* with a view to *damaging* the *facilities of the port* in which the vessel is *laid up.*

Thus treated as complementary parts of a complete system of law, the operation of the three statutes is as follows: 46 U. S. C. A., sec. 701, prohibits injuries to vessels by *seamen* to the *prejudice* of their *owners;* 50 U. S. C. A., sec. 193, prohibits injuries to vessels by *seamen* acting on the *procurement of, and in cooperation with,* their owners to the end of *damaging the ports* where their vessels are *laid up;* and 18 U. S. C. A., sec. 502, prohibits injuries by *trespassers* to vessels that are *engaged in foreign commerce.*

Such construction resolves all conflict between the three sections; gives to each its own distinct office to perform; avoids the absurdities otherwise inherent in the existence, at one and the same time, of three statutes providing, for the same offence and the same offenders, three widely divergent scales of punishment; and achieves every legitimate object that the Congress could have had in mind in the enactment of the legislation.

Judge Parker, it will be noted, did not discuss the foregoing rule of statutory construction or the conflicts in the three statutes that require its application here.

B.

The statute applies only to ships engaged in foreign commerce; not to ships laid up in our ports.

This conclusion would seem to be required for at least four reasons, viz., (1) The words of the body of the statute; (2) the historical background of the statute; (3) appropriate correlation with Titles II and IV of the same act; and (4) the Title heading.

1.

The words in the body of the statute contemplate vessels engaged in foreign commerce.

The body of the statute speaks of vessels "entitled to engage in commerce with foreign nations"; of "cargo" aboard the vessels; of "persons" aboard the vessels; of vessels "while within the jurisdiction of the United States"; and of the same vessels "after they shall have departed therefrom."

The words of the statute also expressly contemplate the case of vessels involved in, or destined for, such activity that to tamper with their motive power and instrumentalities of navigation might have the effect of injuring or endangering their safety. If they were engaged in navigation, such cause might produce such effect; not, if they were dead and laid-up ships, and aground, or tied up to the ground, for an indefinite period.

These features of the body of the statute combine to picture the ships embraced therein as ships actively engaged in carrying our foreign commerce in and out of our ports; not ships laid up in those ports for the duration of the war.

2.

The historical background of the statute suggests that it was aimed at the protection of ships engaged in carrying our foreign commerce.

At the time of the adoption of the statute, the United States was at war. Her ships and those of her associated nations were busily engaged in carrying from our ports munitions, guns, troops and other war materials in vast quantities. It was of the utmost importance that these go forward and that the ships carrying them be not molested.

Yet it was feared—and naturally so—that enemy agents and saboteurs would strike secretly and venomously at

this extensive foreign commerce, through sabotage committed upon the carriers. Attacks from the owners, officers and crews, were not feared. They presumably were all friendly. It was persons not belonging to the ships, spies and saboteurs in the service of the foe, that were feared and that had to be guarded against; enemy agents like those prosecuted in the then freshly presented case of *Daeche* v. *United States, supra,* (C. C. A., 2d Cir.), 250 Fed. 566.

That case grew out of attacks made or attempted by trespassing German saboteurs on allied ships leaving New York for the other side with munitions of war for the use of the allied governments. A conspiracy was hatched in the summer of 1915, whose end was the attaching of bombs to the sterns of such ships when about to leave our harbors, which bombs were to be so arranged that they would ordinarily explode after the vessels had left New York harbor and were out on the high seas. The defendant Daeche was tried and convicted.

A consideration of that case, in connection with the provisions of 18 U. S. C. A., sec. 502, will show that the legislators must have had it in mind in drafting the statute. For that defendant had conspired to place bombs on the steamers; and the statute denounced *such* acts. And the defendant had conspired to do acts in our harbors that would produce casualties after steamers had reached the high seas; and the statute denounced *such* acts. The parallel between that case and the statute is such as strongly to suggest that the latter was drafted to cover a situation such as was presented by the former; that is, the case of attacks made upon steamers engaged in carrying our foreign commerce.

There was at the same time, it is true, another type of *injury* that the United States had suffered prior to entry into the war, in April, 1917, and that, no doubt, was also in the mind of Congress, when the Act of June 15, 1917, was adopted. That was the *scuttling* of ships, laid

up in our harbors, by prospective enemies, so as to block, and impede, the channels through which floated the important foreign commerce aforesaid. That kind of a case was presented in *Wierse* v. *United States, supra,* (C. C. A., 4th Cir.), 252 Fed. 435, 441, which involved the *sinking* of a German steamer, in the harbor of Charleston, and the *blocking,* for a substantial time, of the only channel for the passage of foreign commerce out of that port.

But that kind of a case was covered, as it was meant to be, by sec. 3 of Title II of the Act (50 U. S. C. A., sec. 193). We say, "meant to be." For, as to that, we have unquestioned authority in the contemporaneous utterance of the Chairman of the House Committee as to the purpose of that particular section. When the bill containing that section in the present form, was reported to the floor of the House, Mr. Howard, addressing his remarks particularly to that section, said:

> "It looked to me as if the intention of the section was to protect the harbors and ships in the harbors and navigable waters of the harbors *and keep them from being sunk, or the navigable waters from being obstructed.*" (Emphasis supplied.)

And, to that, Mr. Webb (Chairman of the Committee reporting the bill, the House Judiciary Committee) immediately replied:

> "That *is* what we meant." (Emphasis supplied.) Vol. 55 Cong. Rec., Part 2, p. 1598, col. 1. (65th Cong., 1st Sess.).

The two cases in 250 and 252 Federal Reporter, respectively, well illustrate, therefore, the purposes underlying the two titles of the Act. The *Daeche* case, in 250 Federal, showing the need and the purpose of Title III in the protection of vessels engaged in foreign commerce; and the *Wierse* case, in 252 Federal, reflecting the need and the purpose of Title II in the protection of the har-

bors and harbor waters in the various ports of the United States and ships therein.

Sections 1 and 2 of Title II (*supra*, 11-12), give point to the wide difference between the two classes of vessels covered by Titles II and III respectively. The close supervision of, and assumption of possession over, vessels, as provided for in those two sections, obviously contemplated those vessels laid up in our ports for the duration of the emergency therein referred to; not to vessels moving in and out of our ports in foreign commerce and never in port for more than a few days at a time. Title III, it seems clear, was designed to cover the latter and only the latter.

Judge Parker nowhere referred to the *Daeche* case, though discussed at length in Bersia's written argument; nor did he mention Title II, sec. 3, (50 U. S. C. A., 193), save that, in passing, he referred to it as dealing primarily "with *control* over vessels in ports of the United States", and, as involving "*some* overlapping" with Title III.

He thus evidently overlooked the point that it was Title II alone which, at least expressly, dealt with damage to ships, laid up in our ports, by their owners, officers and crews; and that it was that title alone, which, at least expressly, undertook to curb the destruction condemned in the *Wiersc* case, *not* Title III.

3.

The appropriate correlation of Titles II, III and IV of the Act shows Title III to have been aimed at the protection of vessels engaged in foreign commerce.

In keeping with this Court's rules of decision (*supra*, 50), it is requisite to read together the various sections of the statute, relating to the same general subject-matter, and construe them into one harmonious whole.

In doing so, it is proper to consider the purpose of the legislation and give, if possible, a sensible effect, in the

achievement of that purpose, to each section. The primary purpose of the Act, insofar as the protection of foreign commerce was concerned, was undeniably threefold, viz.: (1) To keep our ports and harbors open for the passage of our foreign commerce; (2) to protect the vessels carrying our foreign commerce; and (3) to safeguard the cargoes that constituted our foreign commerce.

With that fact in mind, it is not difficult to arrive at a satisfactory conclusion as to the distinct and yet related objects that, in the mind of Congress, were to be attained by Titles II, III and IV. Title IV, clearly, was designed to protect the *cargoes* that constituted our foreign commerce; Title III, the *vessels* that carried it; and Title II the *ports* wherein that commerce was laden and sent upon its way.

To construe Title III as aimed at protecting, from their owners, vessels laid up in the harbors of the United States, is to permit it to usurp the function of Title II and neglect the end that it was, in fact, meant to serve, an end that Title II could not possibly serve. It is to confuse the operation and effect of the respective titles to no good end and ascribe to Congress the enactment of legislation not only extremely arbitrary but thoroughly futile.

We say "to no good end" and "thoroughly futile", for it could do neither the American body politic nor its foreign commerce any good to have foreign vessels precluded from dismantling their engines in our ports; since they could, under ordinary circumstances, leave those ports immediately afterward and not only dismantle their engines but, indeed, never return to these shores. To be effective, as an aid to our commerce, Title III, if meant to preserve as instrumentalities of our foreign commerce, (as held by the Circuit Court), foreign ships lying idle in our ports, would have to go further. It would have to exact, as a condition of their being permitted to leave our ports, a pledge on their part to return within such limited time as Congress might

desire and prescribe, and continue going and coming to and from such ports until they finally fell apart.

It is, of course, unthinkable that Congress, in order to avail itself of foreign ships of friendly powers, as instrumentalities of its own commerce, would resort to such coercive measures. But, unless it did so, or went still further and seized them and proceeded to operate them, it could not make them available *as instrumentalities* of *this* country's foreign commerce. The mere requirement that they do nothing toward immobilizing or disabling themselves while here, might conceivably help the foreign commerce of the country whose flag they flew; certainly not ours.

The only purpose that such legislation, as to foreign vessels lying idle in our ports, could logically serve would be the protection of those ports. But that was the purpose of section 3 of Title II. And it is neither logical, nor necessary, nor in keeping with its terms, to ascribe a duplicate purpose to Title III.

4.

The title heading establishes that the statute applies only to ships engaged in foreign commerce.

The heading of Title III was a part of the enactment of Congress (Cong. Rec., 65th Cong., 1st Sess., Vol. 55, part 4, p. 3306). And it unambiguously reads, "Injuring Vessels Engaged in Foreign Commerce" (*supra*, 3, footnote).

If, therefore, we may consult the title heading, we have this additional reason for construing Title III as affecting only vessels engaged in foreign commerce.

The only question on this point is whether we *may* regard the title heading. And, as to that, it seems clear, the answer *must* be in the *affirmative*. (*United States* v. *Fisher*, 2 Cr. 358, 386; *United States* v. *Palmer*, 3 Wheat. 610, 631; *Holy Trinity Church* v. *United States*, 143 U. S. 457; *United States* v. *Katz*, 271 U. S. 354.)

As the rule is generally expressed, it is only where the body of the statute is ambiguous that the title may be consulted. But that refers, not merely to ambiguity in the words themselves, but to ambiguity in the general scope and meaning of the statute.

> "The ambiguity here referred to is not simply that arising from the meaning of particular words, but such as may arise, *in respect to the general scope and meaning of a statute, when all of its provisions are examined.*" (Emphasis supplied.)
>
> *Coosaw Mining Co.* v. *South Carolina,* 144 U. S. 550, 563.

It can hardly be urged that there is no ambiguity here, in Title III, either in the words used or in the general scope and meaning of the statute. See *United States* v. *Saglietto, supra; United States* v. *Tomicich* [D. C. E. D. Pa.], 41 F. Supp. 33; *United States* v. *Martini, supra,* [D. C. S. D. Ala.].

Yet Judge Parker pronounced the statute to be free from ambiguity as to the vessels intended to be covered (314).

In view of the fact, however, that he himself felt called upon, in seeking to clarify the meaning, to read, as a part of the statute, a word that Congress had never used, viz., "usable," speaking in at least three different places of the statute as relating to vessels "usable" in foreign commerce (313, 314, 315), and in view of the further fact that he felt free to introduce a new system of punctuation (314), it would seem that he should have been less averse to looking at the title heading, which was a part of the enactment itself and consisted of words that the *Congress itself* had *actually* used.

In thus declining to consider the qualification *actually used* by Congress, in describing the vessels to be affected by their law, viz., vessels *engaged* in foreign commerce, and substituting *his own* qualification, viz., vessels *usable* in foreign commerce, Judge Parker, it would seem, violated

a cardinal rule of statutory construction. He judicially *assumed* what *he* thought Congress *should* have said, and *shut his eyes* to what they *actually did* say.

> "It is safer to adopt what the legislature have *actually said* than to *suppose* what they *meant to say.*" (Emphasis supplied.)
>
> *United States* v. *Chase, supra,* (262).

It would seem to be well settled that a court may not read into the language of a criminal statute an intent beyond the fair significance of its own words, merely because it feels that such intent is consistent with the underlying policy of the legislation.

> "We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has *repeatedly* held that this rule does *not* apply to instances which are not embraced *in the language* employed in the statute, or implied from a *fair interpretation* of its context, *even though they may involve the same mischief which the statute was designed to suppress.*" (Emphasis supplied.)
>
> *Fasulo* v. *United States,* 272 U. S. 620, 629, quoting from *United States* v. *Chase, supra.*

Vessels *usable* in foreign commerce comprise, of course, a vastly larger class than vessels *engaged* in foreign commerce. And it would seem to follow that Judge Parker was not warranted in thus interpolating his own ideas into the statute and hugely extending its scope, while at the same time refusing to give effect to Congress' *indicium* as to its true limits, insofar as the title of the section might justly serve that end.

The reasoning of Judges Paul and McDuffie, we believe, must be considered preferable. The former said in *United States* v. *Saglietto, supra* (29):

> "But Title III relating to 'Vessels Engaged in Foreign Commerce' was aimed at acts of sabotage committed against vessels engaged in the transportation of materials or persons to foreign lands where the acts were intended to have the future result of endangering the safety of the vessel or the lives of the persons on board or the destruction of the cargo. The reference to bombs or explosives and to the possibility that the results of the forbidden acts might be intended to occur after the vessel had put to sea indicate the nature of the offenses which Congress sought to define and to which it attached the gravity indicated by the penalty provided."

And Judge McDuffie's construction in *United States* v. *Martini*, (509), *supra*, was:

> "In using the language 'to injure or endanger the safety of the vessel,' therefore, as charged in the indictment, Congress did not contemplate an injury by its owners that might result merely in making it unable to move under its own power, but an injury done by others with intent to endanger its entire safety or to encompass its destruction as a whole or as a unit of navigation, when it was being used or was capable of being used at the time of the commission of the offense for the transportation of men and goods to foreign countries."

And that the vessels, involved in the cases at bar, were *not engaged* in foreign commerce seems clear. The dictionary definition of "engaged" in a thing, is to be busy in the carrying on of that thing (*infra*). And these vessels neither were, nor were permitted to be, busy in anything, least of all, foreign commerce. As Judge McDuffie pointed out in *United States* v. *Martini*, (504), *supra*:

> "on June 27, 1940 the Secretary of the Treasury issued an order under the provisions of Title 50, U. S. C. A., Section 191, forbidding the departure of

> the vessel without the Secretary's aprpoval (Federal Register, July 2, 1940, p. 2442)."

The learned Judge was here referring to Rule 7 of the Rules and Regulations adopted by the Secretary of the Treasury, for the governance of vessels in United States ports, under the authority of section 1 of Title II of the Act of June 15, 1917 (*supra*, 11-12). Under that rule, these vessels were prohibited from leaving the ports in which they were laid up without the express consent first obtained of the Secretary of the Treasury (Treasury Decision 50,182, approved June 27, 1940; Fed. Reg., July 2, 1940, p. 2442). And a violation thereof would, under section 2 of the same Title, subject those responsible to a fine up to $10,000 and imprisonment up to two years. The rule read:

> "7. No vessel shall depart from any port or place in the United States, or from any port or place subject to the jurisdiction of the United States, on a voyage where clearance before a customs officer of the United States is required, unless the respective customs officer in charge of the port of departure shall be authorized by the Secretary of the Treasury to permit the departure."

Not only did the British blockade furnish a physical barrier to the Villarperosa's engaging in foreign commerce; the Secretary of the Treasury had furnished a legal barrier as well. And the lifting of that barrier reposed in his sole and uncontrolled discretion.

It results, accordingly, we submit, that the statute no more applied to the ship here involved than it did to the personnel aboard her.

To Judge Parker, however, it was perfectly clear that vessels of the kind here in controversy *were in fact engaged* in foreign commerce. It has been noted *supra* (63-64) that he held the statute *not confined* to vessels *engaged* in foreign commerce; holding that it applied, in

stead, to vessels *usable* in foreign commerce. Nevertheless, he held, though, it would seem, quite unnecessarily, in view of that ruling, that vessels laid up, as these were, *were engaged* in foreign commerce *anyway*.

But, in doing so, he disregarded a stipulation entered into between Government counsel and defendants' counsel, in two of these three cases (*Pieraccini* v. *United States*, pr. rec., p. 8, par. 9; and *Schiaffino* v. *United States*, pr. rec., p. 8, par. 10), wherein it was expressly agreed between the parties that the vessels were

> "not engaged in foreign commerce from October 1, 1940, to March 30, 1941;"

a stipulation that had been particularly called to the Court of Appeals' attention both on the oral, and in the written, argument.

This holding, however, even if it had been permissible and necessary, could not, we think, have been persuasive. For it rests on no sound premises. The learned Judge's conclusion and process of reasoning follow:

> "A vessel of foreign registry, however, which has come into a port of the United States for the purpose of carrying on commerce with foreign countries is a vessel engaged in foreign commerce within any fair meaning of that language; * * *" (313-314).

If true, that would at once wipe out all distinction between Titles II and III of the Act and the two different classes of vessels that Congress therein purported to be providing for. There would be no vessels laid up in our ports (Title II) as distinguished from vessels engaged in foreign commerce (Title III). And the Secretary of the Treasury's sweeping powers of control and possession would enable him to take over any ship of any friendly power whenever it touched at any of our ports for even a few hours in the course of carrying on its foreign commerce.

Judge Parker cites no authority for any such definition of "engaged." As he views it, let a foreign vessel once come to an American port, to pick up a cargo for a

foreign port, she remains "engaged" in foreign commerce until she again leaves the American port, even though she be allowed by her owner, in the meantime, for want of business or other opportunity, to rot at one of that port's wharves or accumulate barnacles at dead anchorage.

As we have seen, *supra*, statutes must be construed in keeping with the ordinary signification of the language used; and, particularly, criminal statutes may not be extended beyond the limits so indicated.

The ordinary, everyday meaning of "engaged," when used in a connection like the present, is, according to Webster's New International Unabridged Dictionary (2d ed.):

> "1. Occupied; employed."

And, according to the New Standard (1924 ed.), it is

> "2. Occupied or busy; without leisure; as, I am *engaged* every morning."

According, then, to our accepted lexicographers, a vessel "engaged in foreign commerce" is one "occupied," "employed," "busy," or "without leisure" in foreign commerce. It is not one that last year *was*, and hopes or expects that next year it *again may be*, so "occupied," so "employed," so "busy," or so "without leisure." To be "engaged in foreign commerce," the activity therein must be *now a present* and an *immediate* activity.

Now, the Circuit Court may think that Congress should not have used such limiting language; that its purpose and policy would have been furthered by using terms that would have covered vessels that were "occupied," "employed," "busy" and "without leisure" in foreign commerce last year, and expect again to be, perhaps, next year. But that is not what Congress did. And it is Congress' function, and solely Congress' function, to fix and define our federal offenses.

"But this court has *repeatedly* held that this rule"

> (construction of a statute in the light of the evil it was designed to suppress) "does *not* apply to instances which are *not embraced in the language* employed in the statute, or *implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress.*" (*Fasulo* v. *United States, supra,* 629.) (Emphasis supplied.)

When a judge deserts the language in which the statute is couched, and adopts, as a guide for its construction, the purpose that *he conceives* it was *meant* to serve, he is, therefore, it would seem, even when he truly knows what that purpose was, treading upon dangerous ground. But, how much more so, when conjecture takes the place of knowledge!

Thus, Judge Parker *assumes*, and, we think, erroneously, that the purpose of Congress in enacting Title III was to protect *vessels usable* in foreign commerce. Judges Paul and McDuffie concluded from both the context and the title heading, and, we think, correctly, that the Congressional purpose was to protect our *foreign commerce*.

Now, if the words, "engaged in foreign commerce", had been so dubious in themselves as to permit a *construction* of their meaning according to the *conceived purpose* of the Act (as, it seems clear, they are not), what would have been the result? Judge Parker would have concluded as he did, that foreign vessels, lying idle in our ports, once "occupied", in foreign commerce and expecting at some future time again to be, were to be treated as "engaged" in foreign commerce, within the meaning of the statute, since they were *usable* in foreign commerce and the purpose of the statute, as *he conceived* it, is to protect vessels that are so *usable*.

But Judges Paul and McDuffie, through such process of construction, would have reached a diametrically opposite

conclusion, viz., that the laid-up and idle vessels were not "engaged" in foreign commerce within the meaning of the statute, since they were not actually occupied in carrying our foreign commerce, and to protect them would, accordingly, have no reasonable tendency to further the Congressional purpose as conceived by those Judges, viz., to protect our *foreign commerce, not* all vessels that might be *usable* therein.

The conception, too, even if justified, that the purpose of the statute was to protect all vessels *usable* in foreign commerce, would still have left the vessels here in question without that purpose. A moment's reflection shows how true this must be. For, when Judge Parker says *usable,* he means *usable* by *whom?* The owners? That could not be. For, as Judge McDuffie pointed out they were not, and could not be, usable by their owners, not only by reason of the British blockade, but also because of Rule 7 of the Rules and Regulations governing idle vessels in our ports and adopted pursuant to section 1 of Title II.

Does Judge Parker mean *usable* by the United States? If so, he is clearly in error. For the United States, as the law stood at all times prior to June 6, 1941,* had no right whatever to use them in foreign commerce or in any other way.

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*It was on this day that Public Law 101 of the 77th Congress, (c. 174, 1st sess.), [H. R. 4466], took effect; the Act that authorized the requisitioning of all foreign shipping tonnage lying idle in waters within the jurisdiction of the United States.

C.

The statute applies only to acts done with both the criminal intent to perpetrate a wrong and the intent to injure vessel-safety.

It was the contention of the appellants below, as it is here, that the statute had no application because, in doing the things complained of in the indictments, they had acted neither with a criminal intent, nor with an intent to injure the safety of their vessels. The District Court ruled against them as to the necessity of a criminal intent. The Circuit Court of Appeals held necessary, neither of those intents, but only an intent to immobilize the ship.

1.

The statute required, as an essential element of the crime therein denounced, the general criminal intent to perpetrate a wrong.

a.

Any other construction would lead to unpermissible absurdities.

Malice is one of the ingredients ordinarily implicit in statutory felonies.

> "There can be no crime, large or small, without an evil mind" (that is, malice or an intent to commit a legal wrong). "In other words, punishment is the sequence of wickedness. Neither in philosophical speculation, nor in religious or moral sentiment, would any people in any age allow that a man should be deemed guilty unless his mind was so. It is therefore a principle of our legal system, as probably it

is of every other, that the essence of an offence is the wrongful intent, without which it cannot exist."

Bishop's Criminal Law, Vol. I, sec. 287, 9th ed.

"*It is a fundamental doctrine of the law that no man is to be punished as a criminal unless his intent is wrong,* and such wrong intent must, ordinarily, be followed by a wicked act—the mere intention not injuring anyone, unless developed into some act to give it force and effect." (Emphasis supplied.)

United States v. *Houghton,* 14 Fed. 544, 549.

"Undoubtedly it is within the power of the legislature to declare an act criminal, irrespective of the intent of the doer of the act. But to admit of such a judicial construction, it must clearly appear that such was the legislative intent. As was said in *Reg.* v. *Tolson, supra**: 'Although *prima facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do a wrong or not. * * * Whether an enactment is to be construed in this sense, or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, and the various circumstances that may make one construction or the other reasonable or unreasonable.'" (*Masters* v. *United States,* 42 App. D. C. 350, 355.)

The slightest reflection will show, we think, how unreasonable it must be to interpret the statute here in ques-

*L. R. 23 K. B. Div. 168.

tion, merely because it is silent on the subject of a "guilty mind", as thereby dispensing with such.

If its terms were to be construed literally, hardly a day would pass in the ordinary operation of a vessel of foreign registry in the ports of the United States, or in the ordinary operation of a vessel of American registry either in such ports or on the high seas, that would not make criminals of everybody connected with the vessel.

For the statute provides that, in addition to the specified acts of setting fire, carrying aboard explosives and tampering,

> "Whoever * * * shall do *any other act* to or upon such vessel while within the jurisdiction of the United States, or, if such vessel is of American registry, while she is on the high sea, *with intent to* injure or *endanger the safety of the vessel* or of her *cargo,* or of *persons* on board * * * shall be fined not more than $10,000 or imprisoned not more than twenty years, or both." (Emphasis supplied.)

Presumably the most of the vessels frequenting our ports are now,—certainly they were in June, 1917, when the statute was enacted,—engaged in the lading and carriage of highly explosive munitions of war, whose very presence constitutes a grave element of danger to the safety of a ship, the other cargo aboard her and all of the persons attached thereto. The owner and master of such a vessel, in undertaking the lading and carriage of such dangerous cargo, it cannot be denied, intend,—of course, from a proper motive,—to endanger the safety of their vessel, their other cargo and their crew. They must be taken to know the enhanced danger resultant to the safety of such; yet, with that knowledge, they court the danger. *That is tantamount to intent to endanger such property and lives;* for, as the trial court ruled below, one is presumed to intend the natural and probable consequences of

one's acts. In so acting, they obviously *intend no wrong;* that is they *act with no malice.* Nevertheless they *do intend* to *jeopardize* their *vessel* and *those aboard her* for the sake of the greater and ultimate good that they have in mind.

But if it be, as respondent has urged and the trial court has ruled, that malice, or an intent to do wrong, is no necessary ingredient of the offense denounced by the statute, then it *must* result that such owner and master are *lawbreakers,* and are *subject to indictment for the commission of a felony.*

When an American vessel passes through waters known to be infested by hostile submarines, it cannot be denied that those responsible are doing, to and upon her, *acts* with an *intent,*—though a most laudable one,—*to endanger her safety.* And if, therefore, the argument should be upheld, that this act of Congress should be read as not impliedly requiring the presence of a *malicious* motive in the doing of the acts therein denounced, the owner and master of such a vessel are, on every occasion on which they send and take their munitions-laden craft through the peril of the war zones, *guilty of a felony.* Their motive, however worthy it may be, if malice be no part of the crime denounced, is no excuse for their conduct, and they are *subject to indictment and punishment as felons.*

Such must be the result, too, when one steamer approaches another alongside a blazing pier and hauls her to safety. The safety of the former and every person and thing aboard her is endangered, and knowingly and intentionally so. And if this statute be construed as not predicating its applicability on the *malicious* perpetration of the acts therein denounced, this Samaritan of the sea, in rescuing his fellow mariner, has *perpetrated a felony,* and is *subject to conviction as a felon, and to imprisonment as such for a maximum term of twenty years.*

The voluntary endangering of the rescuing vessel, her crew and her cargo, is of the essence of salvage. Hence the statute, if not requiring a guilty mind as a condition of its violation, would make all salvage by American ships in port or at sea a felony; and all by foreign ships, in American waters, the same.

The voluntary sacrifice of ship for cargo or cargo for ship, of one interest for the good of the others at risk, is the heart of general average. A steamer's bunker fuel is exhausted. The master *burns his cargo of timber* as *fuel* in the steamer's furnaces. He acts from the *loftiest* human motives. Yet *if* this statute require *not malice,* or *an intent to do wrong,* to accompany the acts it prohibits, the master is a *common felon* and subject, as such, to the *loss of his liberty for a period of twenty years.* And general average, for American ships, becomes a criminal taboo the world over; and, for foreign ships, it becomes the same in American ports.

Again, let us suppose the case that the astute jury, in *United States* v. *Tomicich, supra,* supposed in requesting the trial Judge for further instructions. Their question was:

> "If the owners had so instructed the captain on March 29, 1941, would he have violated any law of the United States by junking his main propelling engine at the pier at which the Belvedere was moored, and selling it to the Northern Metals Company, provided that the hull and auxiliary machinery were not damaged so as to impair its safety or make it a nuisance or a danger to navigation?" (*id.,* pr. rec., p. 51).

The trial Judge refused to answer the question as not within the jury's province. The answer, if given, would have had to be, if the statute is to be construed as dispensing with the criminal intent, that the master, in "junking his main propelling engine" and selling it pursuant

to his owner's orders, would have been violating the law of the United States and subjecting himself to a penalty of imprisonment for twenty years.

Not only that, since the statute is applicable at all times, in peace and in war, there has not been a day that has passed since June 15, 1917, on which it would not have been a felony for any owner or master of such a ship to junk either her engines or the steamer herself; or convert her into a sailing vessel; or into a barge; or into a house-boat. In each and every instance he would have been making a common felon of himself in performing acts of the most innocent character imaginable, which we dare say, have been committed innumerable times during the very period in question.

Indeed, Judge Paul, in his opinion in *United States* v. *Saglietto, supra*, comments, at page 31, on the number of such instances. He says, in speaking of the companion cases tried before him, that

> "it was there shown in evidence that there were in use in transportation in and out of Hampton Roads a number of cargo ships from which the machinery had been removed. These were vessels built by the government during the World War which, after removal of their engines, are now moved by towing."

If the respondent's contention is sound, viz., that malice forms no part of the offense denounced by this statute, then there would seem to be a lot of felons at large, occupying high places in the shipping world,—perhaps even in the Government itself,—who should, instead, be behind bars.

Those are a few of the absurd results that must ensue, if the statute is to be given the application accorded it below. It is unthinkable that Congress had it in mind to produce any such grotesque results by enacting the legislation in question. A "sensible construction" of the stat-

ute is required, one that shall, if possible, avoid such absurdities.

> "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."
>
> *United States* v. *Katz,* 271 U. S. 354, 357.

To read malice, or intent to commit a legal wrong, into this statute as one of its requirements, removes all the foregoing absurdities. And, so far from being unreasonable, or not in keeping with the legislative purpose, such a requirement would seem to be demanded by the very nature of the crime denounced, the severity of the penalty prescribed, and the legislative intent as manifested in the surrounding sections of the Act and the history of the legislation.

We should have supposed, in view of the fundamental necessity, in crime, of a criminal intent, that no court would have permitted itself to enforce this statute (18 U. S. C. A., sec. 502), with its heavy and heinous penalties, on the theory that it had dispensed with the necessity of the all-important *mens rea* as an essential element of the crime denounced by it, without first having carefully considered the matter from every angle and satisfied itself that it had no other alternative open to it.

But the Court of Appeals for the Fourth Circuit, in *Bersia* v. *United States, supra,* viewed the matter otherwise. It considered the point as one deserving of no attention whatever. Said Judge Parker (314):

> "The third contention of appellants is (1) that there was no evidence of malice or intent to commit a wrong on their part, * * *. No discussion is necessary as to the first of these propositions. If the de-

> fendants did the acts forbidden by the statute with the prescribed specific intent, it is elementary that no further showing of malice or intent to commit a wrong is required."

For that "elementary" proposition Judge Parker cites two cases, viz.: *United States* v. *Balint*, 258 U. S. 250; and *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57, 69, 70.

Those were cases of *mala prohibita*. The first involved a violation of the Narcotic Act of December 17, 1914, c. 1, 38 Stat. 785; and the second, a violation of the Minnesota Act, "regulating state lands and the product of the same", (Gen. Laws of Minnesota, 1895, c. 163, sec. 7).

Presumably, therefore, Judge Parker meant that the offense created by the statute we consider here, Title III of the Act of Congress of June 15, 1917, constitutes a mere *malum prohibitum*, the committing of which renders one liable to its pains and penalties, regardless of one's innocence, and irrespective of one's intent, so long as it be to do the thing prohibited. This, we submit, is an altogether startling doctrine: That Congress in enacting this statute could have meant that, under its provisions, a perfectly innocent man might be cast in prison for practically one-half his adult life!

And it must be that the promulgation of such a doctrine, by the distinguished Judge that announced it, was due to his failure to consider not only the true nature of that exceptional class of offenses we term *mala prohibita*,—requiring, for their commission, no criminal intent,—but also the wide difference obtaining between them and true crimes.

b.

The nature of the offense, created by the statute, and the seriousness of the penalty, provided for it, forbid that it should be construed a mere *malum prohibitum*.

The offense here created is not a "Public Welfare Offense", a petty police regulation, a mere ***malum prohibitum***, the committing of which, irrespective of *mens rea*, constitutes a violation of the statute. The line separating statutes denouncing *true crimes* from those interdicting mere *mala prohibita* may not be, as yet, a very sharply defined one, but at least it is sufficiently traceable to enable us to tell at a glance that a statute like 18 U. S. C. A., sec. 502, patently falls in the former category.

> "The line distinguishing offenses which do and those which do not require *mens rea* in the absence of statutory direction depends upon (a) the character of the offense, and (b) the nature of the penalty involved in its violation. In general, offenses not requiring *mens rea* are the minor violations of laws regulating the sale of intoxicating liquor, impure or adulterated food, milk, drugs or narcotics, criminal nuisances, violations of traffic or motor-vehicle regulations or of general police regulations passed for the safety, health, or well-being of the community and not in general involving moral delinquency."
>
> "Public Welfare Offenses" by Francis Bowes Sayre, 33 Col. L. Rev., (1933), 55, 83.

In the Columbia Law Review article just cited, Mr. Sayre has presented a complete collection of references to, and an illuminating study of, the so-called "Public Welfare" or *mala prohibita* offenses, as distinguished from true statutory crimes. And, in emphasizing the importance of the prescribed penalty as a criterion for determining

whether a given statutory offense belongs in the one group or the other, he says (72):

> "If this" (the penalty) "be serious, particularly if the offense be punishable by imprisonment, the individual interest of the defendant weighs too heavily to allow conviction without proof of a guilty mind. To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure. *Crimes punishable with prison sentences, therefore, ordinarily require proof of a guilty intent.*" (Emphasis supplied.)

This statute provides a maximum penalty of twenty years, substantially one-half of an adult life. If the respondent cares seriously to urge that Congress meant to provide such a penalty for one acting with *no criminal intent*, let it show us *just one* case in which either Congress or any other responsible American legislative assembly ever attached such a penalty to the commission of a mere *malum prohibitum!*

Judge Parker's brief dismissal of the point, viz., that malice is an essential ingredient of the crime denounced, used, however, language that suggests, we believe, the possibility that he thought that the mere commission of an otherwise innocent act would, when the same was prohibited by statute, involve, in and of itself, a showing of wilfulness or malice. He said (314):

> "If the defendants did the acts forbidden by the statute with the prescribed specific intent, it is elementary that no *further* showing of malice or intent to commit a wrong is required." (Emphasis supplied.)

The implication of that word "further" seems to be that Judge Parker thought that the mere commission of the prohibited act would import malice. If so, we submit, a serious confusion of thought is involved.

As we understand it, there are only two ways in which malice or wilfulness may be attributed to a man in the criminal law, viz.: (1) By his committing or conspiring to commit an act that is *wrong in itself, a malum in se;* and (2) by his committing an otherwise innocent act that he *knows* to have been prohibited by statute.

That is, to say, if the act committed is innocent in itself but prohibited by statute, he cannot properly be charged with having done it wilfully or maliciously or with a criminal intent, unless he *knew* of the statutory prohibition (*United States* v. *Murdock*, 290 U. S. 389, 394; *Hargrove* v. *United States*, [C. C. A. 5th Cir.], 67 F. [2d] 820, 823).

If, therefore, in the case at bar, wilfulness or malice was, as appellants contend, an essential ingredient of the offense charged, it could be shown only by proof of their having intended, in doing what they did, to commit *a legal wrong, a trespass to some one's hurt or injury,* or by proof that they *knew* of the *existence of the statute* and *wrongfully intended to evade its obligation.* And there was no proof of either.

c.

The provisions of the surrounding and similar sections, as well as the history of the legislation itself, show malice to be an essential element of the crime denounced.

Section 3 of Title II (50 U. S. C. A., sec. 193), quoted in the footnote *supra* (12-13), provides that for injury or destruction, done by an owner of a ship or a seaman belonging thereto, to be unlawful, it must have been done "wilfully". And "wilfully" means "maliciously" or "with an intent to do wrong". The word "wilful", as used in crim-

inal statutes, has been defined by this Court as implying "knowledge and a purpose to do wrong" (*Potter* v. *United States,* 155 U. S. 438, 446; *Spurr* v. *United States,* 174 U. S. 728, 734; *Felton* v. *United States,* 96 U. S. 699, 702; *Hargrove* v. *United States, supra*). The term "wilfully" involves "evil intent or legal malice, according to the great weight of authority" (*Brown* v. *The State,* 137 Wis. 543, 549); and is, therefore, interchangeable with the word "maliciously" (*State* v. *Smith,* 119 Tenn. 521, 526-527; *Commonwealth* v. *Carson,* 166 Pa. 179, 183).

Accordingly, we see that malice or criminal intent is a prerequisite to guilt under the section of the Act making unlawful the injury or destruction of vessels laid up in the ports of the United States (Title II). Now, if that be so, and, at the same time, no similar requirement affects Title III, observe the absurdity that must result. It would mean that, while Congress provided, in the next preceding section but one of the Act, that if an owner, master, officer or crewman, *maliciously* injured or destroyed his ship, he could be sentenced to prison for only *two years,* yet it enacted in this that if he *innocently* did the same act, or even only *innocently attempted* it, he could be sent to prison for *twenty* years!

Would it not be an unpardonably grotesque result for Congress to provide in one section that a seaman's *malicious* destruction of his ship should be only a *two-year* crime, and in a contemporaneous section that his *innocent* doing of the same thing or less should constitute a *twenty-year* crime?

If Title II of the Act is thus persuasive in showing malice a necessary ingredient of the crime denounced in Title III, no less so is Title IV, (*supra,* 36), when viewed in the light of its legislative background. The latter section prohibited injury or destruction, by fire or explosives, to *cargo* in foreign commerce, as Title III prohibited, by such, among other, means, injury or destruc-

tion to *vessels* in such commerce. Title IV provided that, for its violation, punishment by imprisonment might run to ten years. And, like Title III, it did *not expressly* provide that the injury or destruction, therein denounced, must, in order to be unlawful, be *wilfully* or *maliciously* done.

But, that it was the intention of Congress, in respect at least to Title IV, that the injury or destruction prohibited *must* be *wilfully* or *maliciously* done, in order to constitute the crime denounced, clearly appears from the history of the Act while in course of passage. When the bill (H. R. 291) had been reported onto the floor of the House and those in charge of the same were explaining the purpose and scope of its various provisions, Mr. Graham, a member of the reporting committee, in speaking of Title IV, said:

> "What we want to get at is those efforts to *interfere* by violence with the exercise of *rights* that belong to the American citizen in respect to foreign commerce that can be legitimately carried on during a time of war. * * * I said, in speaking of this paragraph, that it approaches the border line of what ought to be or ought not to be in Federal legislation; but in view of its affecting the continuance and freedom of foreign commerce we thought that in order to meet difficulties on the part of States in enforcing it separately, we ought to make a provision by which the Federal power, with all its resources and all of its strength, should pursue those *who seek to violate the law* and *attempt to destroy property for their own malicious purposes* in seeking to *interfere* with the exercise of *legal rights* on the part of American citizens." (Vol. 55 Cong. Rec., Part 2, p. 1720, cols. 1-2; 65th Cong., 1st Sess.; emphasis supplied).

Here, then, we have an unambiguous avowal, coming

from within the House Committee itself that drafted the law, that it was intended to prevent *interference* with *legal rights,* interference on the part of those who would *seek to violate the law* and *attempt to destroy property for their own malicious purposes.* Clearly, there can be no doubt, then, that at least as to Title IV, it was the Congressional, will that malice be an essential ingredient of the crime, therein denounced, against *cargo* in foreign commerce.

But, if Congress meant, in Title IV, that the injury or destruction of *cargo* in foreign commerce should be unlawful only when done with a *criminal* or *malicious* purpose, *reason* requires us to conclude the same thing as to the intent of Congress in respect to the injury or destruction of *vessels* denounced in Title III. The two titles are cognate, they are of one piece and were designed to serve similar ends. The one was to protect the *cargo;* the other the *vessels* that *carried* it. Obviously they *must* receive the *same* construction.

This argument becomes conclusive when we regard the chapter heading of the law (Title III), as it read, when the section enjoyed the dignity of a separate bill (S. B. 6793), and, therefore, an expanded title which could describe its purpose in more detail. It was there recited that it was "willful" injuries or attempted injuries that were denounced. It read:

> "A bill to prevent and punish *willful* injury or attempted injury to, or conspiracy to injure, any vessel engaged in foreign commerce, or the cargo or persons on board thereof, by fire, explosion or otherwise" (Cong. Rec., 64th Cong., 2d sess., vol. 54, pt. 4, p. 3422). (Emphasis supplied.)

Subsequently, as pointed out in Judge McDuffie's opinion, in *United States* v. *Martini, supra,* this Senate Bill 6793 was merged into Senate Bill 8148 and became, in

consequence, but one of numerous sections thereof. The chapter heading, accordingly, had to be, and was, reduced to section size. But that, of course, evidenced no change in the purpose of the bill, the content thereof remaining quite the same as before.

That *wilfulness* or *malice* was meant to be an essential ingredient of the crime denounced in this Title III of the Act of June 15, 1917, is further manifest from a consideration of the provisions of the Sabotage Act (*supra,* 37-41).

The express terms of the Sabotage Act show that the crimes therein denounced, which were confined to war-time and to materials and utilities, including boats, suitable for war-purposes, had to be committed wilfully,—that is, maliciously,—in order to be within the prohibitions of the statute. And the House Judiciary Committee, in reporting out the bill that subsequently became the law, confirmed the fact that malice was of the essence in the offenses therein denounced (*supra,* 39-40).

If Congress intended, then, as it thus did, to make the destruction in war-time of boats, *suitable for war-purposes,* punishable only, if wrought with malice, with a *criminal* intent, it scarcely could have intended less in an act designed merely to protect *foreign commerce* at all times, *in peace-time* as *well* as *war-time.*

d.

The Grand Jurors, who returned the indictment in this very case, regarded malice as an essential ingredient of the offense charged.

The grand jurors in this very case agreed with the appellants' construction of the statute. For they charged in their indictment that the appellants, in doing the acts complained of, had done them "wilfully".

c.

There was no showing of malice in the proofs.

As pointed out *supra* (81), not only is the record barren of any proof of guilty intent or knowledge, but the pertinent testimony all tends to establish its entire absence. The only evidence offered against the appellants, apart from the mere evidence of the damage, consisted of either their own testimony or their own statements. And this, with unanimity, showed that, in doing what they did, they were acting under orders with the approval of their government and their owners, without the slightest reason to know of the statute here in question, or wrongful or other intent to evade its obligation.

If appellants are right in their contention that a showing of malice or intent to commit a wrong was necessary, since there was neither proof offered, nor even claim advanced, that they knew of the statute, it is important to observe that the proofs show that there was none against whom any malice or intent to commit a wrong could have been directed.

Construed, according to the standards of the common-law, as we have seen, the malice, required by the statute, could only be, since it mentions only vessel, cargo and persons on board, malice against the owner of the vessel, or against the owner of the cargo or against the persons present on the vessel. For, at common law, before the destruction of property could be punished as a crime, it had to be accompanied by malice *against the owner.* The malice had to be, as defined in *State* v. *Robinson, supra* (p. 16), "ill-will or resentment towards its owner or possessor". And that rule knew no exceptions. (2 East P. C. 1072; *Rex* v. *Austen,* Russ. & Ry. 490; *Comm.* v. *Shaffer, supra,* 379.) And, as hereinbefore pointed out, the requi-

site malice, where the offence is created by statute, must in the absence of words expressly and affirmatively modifying the common-law rule, be the same; that is, ill-will or resentment toward the owner (*Rex* v. *Shepherd,* 1 Leach, 539; *Rex* v. *Pearce,* 1 Leach, 527; *Rex* v. *Hean,* 1 Leach, 527, note; *State* v. *Mason, supra, Dotson* v. *State, supra*).

> "Malice is the gravamen of this offence" (criminal destruction of property), "and it must be malice to the owner."
>
> *Northcot* v. *State,* 43 Ala. 330, 334.

But the owners had consented to, and approved of, what defendants did. Certainly no proofs were offered, or claim made, to the contrary.

It cannot be argued that malice against the vessel would answer the requirements of the statute. Malice against a thing, as the cases cited *supra* show, *never* made destruction of property criminal, either at common law or under the statutes.

This statute (18 U. S. C. A., sec. 502), did not purport to negate or modify the common-law rule. And to say that the expression, "intent to injure or endanger the safety of the vessel", was equivalent to "malice against the vessel", would be no more than saying that malice had been dispensed with as an element of the crime; which, as we have above seen, is unthinkable.

Nor, for the same reasons, can it be urged that malice against Great Britain, or even against the United States, would satisfy the statute. Besides, the malice must be an intent to commit a wrong. And to injure the vessel's safety could constitute a wrong against neither sovereign.

Nor would a generally evil disposition or unworthy motive constitute the requisite malice. Unless there be an intent to commit a wrong, however ignoble the motive, the

element of legal malice is necessarily wanting (*Mayor, etc.,* of *Bradford* v. *Pickles,* [H. L.], [1859] A. C. 587). Legal malice requires more than a black heart (*State* v. *Ferguson,* 91 S. C. 235, 243).

If it be said, that the statute prohibits, and provides a punishment for, such acts, when done with intent to injure the safety of the cargo or of the persons on board, and that the owner's so acting, with such an intent, would involve the necessary malice required by the statute, the answer is that that is not this case. There was no cargo, and the only persons aboard were members of the crew themselves.

Respondent may argue that the necessary malice or intent to do wrong, requisite to conviction, may be inferred from the evidence to have been an intent to deprive the United States of a vessel that it needed for purposes of national defense. But, as the Court will judicially observe, the law, as it existed in March, 1941, gave the United States no right whatsoever to use the vessel in any way, for national defense or otherwise; and to deprive her thereof could be no wrong (*Mayor, etc., of Bradford* v. *Pickles, supra*).

It may be argued again, that the defendants' malice consisted in their intending to impede or congest the harbor facilities of the port in which they were, and to imperil the property, located in and around such port, and the shipping moving in and out of the same. But the statute (18 U. S. C. A., sec. 502) was not directed toward the protection of the port facilities of the United States or of the property lying in or about her harbors. That was the office of 50 U. S. C. A., sec. 193. And, in any event, there was no proof whatever of any such intent.

Under the proofs, there was none against whom the appellants did intend, or could have intended, to com-

mit a legal wrong. *They acted to save their ship from an enemy, which, so far from being a base, ignoble or criminal purpose, is one of that class of objects which through all time have been hailed as the noblest that can motivate human action.*

2.

The statute requires, as an essential element of the crime therein denounced, the specific intent to injure the safety of the vessel or of the cargo or lives aboard her.

As pointed out *supra* (41-42), the words of a criminal statute must be strictly construed and may not be extended by construction to cover a case not fairly embraced within their natural scope and import. Applied to the statute here in question, in respect to the specific intent required to make unlawful the acts therein specified, it would seem clear that the rule necessitates that that intent must be one aimed at threatening the safety of the vessel as a whole, not one directed merely toward injuring some part of her or toward injuring her capacity for use.

The Act so reads. And so Judge Paul has construed it (*United States* v. *Saglietto, supra*). So Judge Chesnut has construed it (*Schiaffino* v. *United States, supra,* argued herewith, certified typewritten record, pp. 390, *et seq.*). And so Judge McDuffie has construed it (*United States* v. *Martini, supra*).

Judge Paul, in reviewing his instructions to the jury, said (27):

> "The government contended that injury to the motive power was in itself an injury to the vessel within the meaning of the statute and that proof that the machinery had been intentionally damaged was all that was necessary to constitute proof of the offense charged. The Court *rejected* this view and

instructed the jury substantially that injury to the motive power of the vessel with the intention only of rendering the vessel incapable of navigation under its own power was not sufficient; *that it was necessary that the damage to the machinery should have been intended to endanger the safety of the vessel as a whole or the safety of the persons on board.* * * *

"Further consideration of the statute has convinced me that the interpretation sought by the government was properly rejected and that the instructions given the jury were, at least, substantially correct." (Emphasis supplied.)

In expounding the proposition that the plain language of the statute confined its applicability to acts coupled with an intent to injure or endanger the safety of the ship or of the cargo or persons aboard her, Judge Paul continued (27):

"If Congress intended that any intentional injury to the motive power of the vessel, regardless of the consequences thereof, should constitute the criminal act, it would have said so, and it could have been said in very simple language. All that would have been necessary woud have been to prohibit tampering with the motive power of the vessel 'with intent to injure said motive power', or 'with intent to render the same incapable of operation', or some language of similar effect. Any declaration as to endangering the vessel, endangering its cargo, or endangering the persons on board would have been completely unnecessary and to no purpose if any intentional injury to the machinery standing alone constituted the completed offense. There would be no occasion to enumerate possible results of the injury to the motive power if the injury itself constituted the offense. It would then have been a crime

> regardless of the consequences that might follow or even if there were no consequences other than the mere injury to the motive power. *But this is not what Congress said.*" (Emphasis supplied.)

And, after citing various other cogent reasons for not extending the effect of the statute beyond the limits necessitated by its own simple language, Judge Paul concluded (29):

> "From these considerations it would appear that in any case arising under this statute where there is no evidence of an intent going beyond that of merely impairing or destroying the machinery of a vessel, then the offense is more nearly covered by Title II, which forbids the causing of any injury to the vessel. And it would equally appear that on any charge of a violation of Title III, *a necessary element of proof* is that the injury done to the machinery was done *with an intent going beyond that of mere impairment of the motive power and extending to further results* designed to flow from the tampering with such motive power, *namely, to imperil the safety of the vessel or the lives of those on board.*" (Emphasis supplied.)

And Judge McDuffie, in *United States* v. *Martini*, *supra*, on reasoning substantially similar to that of Judge Paul, reached the same conclusion. In announcing the same, he said:

> "In using the language 'to injure or endanger the safety of the vessel,' therefore, as charged in the indictment, Congress did *not* contemplate an injury by its owners that might result *merely in making it unable to move under its own power, but an injury done by others with intent to endanger its entire safety or to encompass its destruction as a whole or as a unit of navigation, when it was being used or*

was capable of being used at the time of the commission of the offense for the transportation of men and goods to foreign countries." (Emphasis supplied.)

Judge Chesnut, in *Schiaffino* v. *United States, supra,* (argued herewith), whose holding has now been overruled by the opinion of Judge Parker in the Fourth Circuit Court of Appeals, reached the same conclusion as that arrived at by Judges Paul and McDuffie. And his conclusion was based on the language of the statute as viewed in the light of the history of its passage through Congress. He said orally from the bench (certified typewritten transcript of record filed herewith, pp. 390, *et seq.*):

"Now, with regard to the main question of construction of the phrase 'with intent to injure or endanger the safety of the vessel', as a result of a careful reading of the legislative history of the Act * * *, I have concluded that the proper construction is the word 'injure' modifies the word 'safety'; and the reason for that is that the original phraseology of the statute as it was drawn in the House of Representatives reads this way:

'If any vessel, domestic or foreign, etc., is upon the high seas, or, if foreign, within the ports of the United States, whoever sets fire to such vessel or its cargo, or tampers with its motive power or instrumentalities of navigation, or places bombs or explosives in or upon it or does any other act to or upon it with intent to injure or endanger *its* safety or the safety of its *cargo* or the *persons on board* * * *.'

* * * * *

"Now, the change in phraseology from the original draft to the final draft was not considered, according to the legislative history, as making any difference or change in the substance of what was prohibited.

* * * * *

"So, I think the proper construction of that phrase

'with intent to injure or endanger the safety of the ship' means 'injure' in the sense of 'impairment' and the injury in that sense must affect prejudicially the *safety* of a vessel." (Emphasis supplied.)

The original House Bill, H. R. 291, to which Judge Chesnut adverted, read, in the section here under discussion, as follows:

> "If any vessel, domestic or foreign, within the jurisdiction of the United States, or if any vessel of American registry, enrollment or license, is upon the high seas, whoever sets fire to such vessel or its cargo, or tampers with its motive power or instrumentalities of navigation, or places bombs or explosives in or upon it, or does any other act to or upon it, with intent to injure or endanger its safety or the safety of its cargo or of persons on board, whether the injury or damage is intended to take place within the jurisdiction of the United States or after the vessel has departed therefrom, or whoever attempts or conspires to do any such acts, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."
>
> Report of Committee on Judiciary on H. R. 291, (Report No. 30, 65th Congress, first session, House Reports, Vol. I).

After passage in the House and amendment in the Senate to its present form, and after it had been sent to, considered in and reported out of conference, its House managers reported to the House that

> "The House provisions under this title" (Title III) "were not materially changed."
>
> Congressional Record, (65th Congress, 1st Session), Vol. 55, Part 4, page 3306.

The Circuit Court for the Fourth Circuit, ruling, in the case at bar, that the language of the statute should, on the contrary, be construed as denouncing acts done with an intent either to injure the *vessel or* endanger her safety, adopted reasoning that logic must condemn. First, it was said (314), "No one speaks of injuring the safety of an object". Well, the House *did,* as we just have seen, in its original House Resolution 291. It denounced the acts in question when done on or to a vessel "with intent to injure or endanger its safety". The verb "injure", as used there, could not possibly be said to take any object but "safety".

The House of Representatives, therefore, at least at the beginning, spoke "of injuring the safety of an object". And if its managers spoke truly, on returning from conference and reporting the Senate amendment, both the House *and* the Senate so spoke. For those managers, as just noted, reported that the amendment introduced but a change of form, not of substance.

And that the change, in this connection, was no more than one of form would seem obvious on the slightest reflection. For the only alteration of the particular expression before us was the adoption of *one possessive form for another.* "Its safety" was changed to read "safety of the vessel". One of the first lessons in English taught to high-school freshmen is (or at least used to be) how to alter the form of a phrase without affecting its meaning. And one of the principal of those exercises was to convert the possessive pronoun and its object into the prepositional form: As "John's house" into "the house of John".

Nor did the House want good authority in speaking of the *injuring of safety.* See Milton's "injured merit" (Paradise Lost, Book I, line 98); and Shakespeare's "injury" to "honor" (Cymbeline, Act II, Scene IV, line 102). "Injury" means, essentially, a *wrong.* And the safety of one's person or property can be wronged, it would seem, as well as anything else.

Judge Parker said, however, (314), that his interpretation would be "seen to be manifestly correct if the words, 'or endanger the safety of', be set off by commas". But, on the contrary, when that is done and the altered construction viewed, it will be found to be both meaningless and ungrammatical. It would then read:

> "with intent to injure, or endanger the safety of, the vessel or of her cargo, or of persons on board."

Under Judge Parker's punctuation upon what, would he say, the phrases "of her cargo" and "of persons on board" depend? Surely, not upon "injure": One could not say "to injure of her cargo" or "injure of persons on board". Nor upon "endanger the safety of": It would never do to say "endanger the safety of of her cargo" or "of of persons on board". To adopt Judge Parker's suggested punctuation, could only serve to create, not resolve, difficulties of construction.

If we are to try, before construing the Act, to improve upon Congress' own punctuation, we should at least adopt some system of punctuation that will clarify rather than obscure. We might, in such an attempt, insert the first comma where Judge Parker proposes, that is after the word "injure", but the second after the word "safety", instead of after the first "of".

Then the passage reads:

> "with intent to injure, or endanger the safety, of the vessel or of her cargo, or of persons on board."

This would seem to be some improvement upon Judge Parker's punctuation. For the prepositional phrases, "of the vessel", "of her cargo" and "of persons on board", here may properly lean upon the expression "endanger the safety". But the difficulty still inheres, however, that

they cannot modify "injure"; and that verb is, therefore, left groping for an object.

Only one other mode of punctuation is left to be tried, in our effort to clarify the meaning of the passage. And that is, while still leaving Judge Parker's first comma where he placed it, to move the second forward a couple of words and let it become fixed after the word "endanger". Then the passage reads:

> "With intent to injure, or endanger, the safety of the vessel or of her cargo, or of persons on board."

Now that, we see, makes both good sense and good grammar. And that, we submit, is how Judge Parker should have disposed of his commas, if he felt that the passage required to be clarified by the addition of punctuation. By so doing, it will be seen, everything would have been made perfectly clear. Each word, each phrase, would then have occupied its own distinct place and performed its own distinct function. The passage would have been a model of good English. No hiatus, no over-lapping, no tautology. And the meaning would have been perfectly patent.

But it would have condemned, as insupportable, Judge Parker's conclusion as to the meaning of the passage.

But the learned Judge adds a still further reason for holding that the statute must contemplate intent to injure the vessel, as well as to endanger her safety. He says (*id.*):

> "the subsequent phrase of the section, 'whether the injury or danger is so intended to take place within the jurisdiction of the United States, or after the vessel shall have departed therefrom,' shows clearly that what was contemplated as embraced within the prescribed intent was injury itself as well as danger or the impairment of safety."

His thought must be that the use of the noun "injury", in that later passage of the section, supports his conclusion on the theory that the noun "injury" can only mean "injury to vessel" and cannot mean "injury to vessel's safety". But the theory would seem to involve a logical error. For if the verb "injure" may take, as its object, "the vessel's safety", no reason is apparent why the noun "injury" may not refer to "vessel's safety", quite as readily as it may to "vessel".

But the conclusive answer to this particular reasoning of Judge Parker is the fact that the very self-same subsequent phrase was in House Resolution 291, as originally adopted in the House (*supra,* 93), when the possessive form of vessel's safety read "its safety" instead of "safety of the vessel", and when, therefore, "injury or danger", as used one or two lines below, *must* have referred to "injury or danger to vessel's safety", and could not conceivably have referred to "injury or danger to vessel".

If that subsequent phrase, "whether the injury or danger", etc., *must* have referred, in the original House Resolution, to injury or danger to the safety of the vessel, reason fails to suggest why it now must mean something else, merely because the form, not the substance, of *another* expression in the Resolution was thereafter changed, —merely because a possessive expression was converted from the possessive-pronoun form to the prepositional form.

We submit that the three reasons advanced by Judge Parker for disregarding the plain language of the statute do not support his conclusion; that the reasoning of Judges Paul, Chesnut and McDuffie is unanswerable; and that the statute, properly construed, has no application to mere injuries to motive power of a vessel, as such, or to mere usability of the vessel, but contemplates and denounces such injuries, as criminal, only when effected with a purpose to endanger the safety of the vessel, or of her cargo, or of the lives aboard her.

POINT II.

The Indictment was insufficient.

As Chief Justice Ruffin said in *State* v. *Mason, supra,* (13 Ire. 341, 342):

> "In indictments for injuries to property, it is necessary to lay the property truly, and a variance in that respect is fatal."

The indictment here involved is for an injury to property, a vessel, but it failed to lay the property in anyone. It simply charged the defendants with having done acts on and to the motive and navigational equipment of a vessel, with an intent to injure her safety. This was a fatal defect. (*Rex* v. *Patrick,* 2 East P. C. 1059; *State* v. *Mason, supra; Woodward* v. *State* [Ct. of Cr. App. Tex.] 28 S. W. 204; *State* v. *Pierce,* 7 Ala. 728; *Staaden* v. *People,* 82 Ill. 432; *State* v. *Jackson,* 7 Ind. 270; *State* v. *Brandt,* 14 Ia. 180; *Davis* v. *Comm.,* 30 Pa. 421; *State* v. *Click,* 115 Tenn. 283; *State* v. *Smith,* 21 Tex. 748.)

The rule requiring that the owner of the property be named in the indictment is, as pointed out in *State* v. *Mason, supra,* one of universal application in cases involving alleged offenses against property. It is true not only of malicious mischief. It is equally true of arson (*Rickman's* case, 2 East P. C. 1034; *U. S.* v. *Cardish,* 145 Fed. 242, 248); of larceny ([1596], *Long's* case, Cro. Eliz. 490; *Regina* v. *Carter,* [1703], 2 Ld. Raym. 890; *Regina* v. *Ward,* 7 Cox C. C. 421); of burglary (*Rex* v. *White,* 1 Leach 252); of embezzlement (*Rex* v. *McGregor,* 3 Bos. & P. 106); and of obtaining property by false pretenses, *Martin* v. *Regina,* 3 N. & P. 472).

The reason for the rule is the necessity of showing property in someone other than defendant; for, as pointed

out in Point I, *supra* (18-41), unless that is shown, no crime is charged.

Judge Parker, in the case at bar, said that it was enough for the indictment, in order to be good, to follow the language of the statute (314). And for that proposition he cites *Ledbetter* v. *United States*, 170 U. S. 606. We have no quarrel with that rule where it properly applies. But, as is shown both by that very case and by *United States* v. *Carll, supra,* the rule has no proper application where the statute does *not express all* the ingredients of the crime denounced.

Whether the statute here *does or does not* express all the ingredients of the crime is the question to be determined. Hence, Judge Parker would seem to be begging the question when he says it is sufficient for the indictment to follow the statute. In the one event, it is; in the other not.

And the insufficiency of the indictment in this respect is one not cured by the verdict (*Regina* v. *Ward, supra; Martin* v. *Regina, supra; United States* v. *Hess*, 124 U. S. 483).

POINT III.

Evidence was wanting to sustain a conviction.

The Government's case, on the point of proofs, was wanting in two main particulars. (1) It contained no evidence of malice or intent to commit a wrong; (2) it failed as to proof of intent to injure the safety of the vessel.

The absence of any proof of malice has been discussed *supra* (86-89) and need not be reconsidered here.

The want of any showing, as to intent to injure the vessel's safety, is equally patent. (*United States* v. *Saglietto, supra; United States* v. *Martini, supra.*)

POINT IV.

The statute, as applied, violates the Fifth Amendment of the Federal Constitution.

If the construction of this statute must be that accorded it below, it would seem clearly to follow that it cannot meet the test of constitutionality. For, if a man is to be deprived, by act of Congress, of the right, peaceably, and without injuring, or threatening injury to, a living soul, to dispose of his own property as he sees fit,—and to remove the motive power of a vessel and convert it into a barge or houseboat, *is* one means of disposing of it,—there can, we should suppose, be scarcely a doubt that his most sacred property rights have been unreasonably invaded, violated and destroyed, without the due process of law guaranteed by the Constitution. (*Chicago, R. I. & P. Ry. Co.* v. *U. S.*, 284 U. S. 80, 97; *Burco* v. *Whitworth*, 81 F. [2d] 721.)

True, Congress may regulate foreign commerce, and its power to do so is as extensive as the needs of the commerce itself, but it may not arbitrarily or capricously exercise that great power. Legislation adopted toward that end must tend measurably to achieve the objective aimed at. Otherwise, in unjustifiably infringing upon the rights of property, it violates the due process clause of the Fifth Amendment (*Chicago & P. Ry. Co.* v. *United States, supra*).

We have shown *supra* (61-62) that the statute, as construed below, bears no relation to its avowed purpose of protecting foreign commerce. And as to its destructive infringement on the rights of property, there can be no doubt (*supra*, 75-76).

The statute, so construed, would violate the Fifth Amendment, too, because of the absence of any standards whereby to enable vessel-owners to determine the limits of the

forbidden and the permissive, in respect to the use of their vessels in dangerous trades or undertakings, leaving all questions of such character to be determined, as they were determined here, after the event, by juries whose findings must be necessarily based upon merest speculation and subject to no fixed criteria of right and wrong.

> "The applicable rule is stated in *Connally* v. *General Construction Co.*, 269 U. S. 385, 391: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'"
>
> *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453.

It is not too much to say that, if the construction of the statute contended for by the Government and indulged in below, were to become fixed in our jurisprudence, and enforced indiscriminately, it must in the end work the ruin, instead of improvement, of the foreign commerce of the United States (*United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *Smith* v. *Cahoon*, 283 U. S. 553).

POINT V.

The writ of certiorari prayed for should be granted to the end that this Court may review and reverse the judgments entered below.

Respectfully submitted,

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